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In The

Supreme Court of the United States

October Term, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, *et al.*,
Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is it constitutional for the State to condition hiring for public jobs on active political support of a single favored political organization to such an extent that competing candidates are placed at a substantial electoral disadvantage?

2. Are rights of association and speech of disfavored candidates (and their voter-supporters) abridged by the State's policy of excluding from public employment anyone who openly supports those candidates?

3. Do disfavored candidates and voters, whose interests are materially impaired by a politically conditioned hiring system, have standing to claim that it violates their constitutional rights?

LIST OF PARTIES

Petitioners are Michael L. Shakman and Paul M. Lurie, individually and on behalf of the classes of independent candidates (not candidates of a regular party organization) and their voter-supporters, in Cook County, Illinois. Respondents are George W. Dunne, individually, as President of the Board of Commissioners of Cook County, and as Chairman of the Democratic Party County Central Committee for Cook County; Stanley J. Kusper, individually and as Clerk of Cook County; Thomas C. Hynes, individually and as Assessor of Cook County; the Forest Preserve District of Cook County; and the Democratic Party County Central Committee for Cook County and its members. These are all of the parties to the case in the court of appeals, from which review is sought.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Michael L. Shakman and Paul M. Lurie, individually and on behalf of classes of independent candidates and voters, respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 5, 1987.

OPINIONS BELOW

The opinion of the United States District Court granting petitioners' motion for summary judgment on liability as to respondents' patronage hiring practices is reported at 481 F. Supp. 1315 (N.D. Ill. 1979). Findings of fact concerning those practices were entered with that opinion but not published. Final declaratory and injunctive relief concerning respondents' hiring practices was entered by the district court on April 4, 1983, and is reported at 569 F. Supp. 177. The decision of the court of appeals, reversing that judgment and dismissing petitioners' patronage hiring claims, is reported at 829 F.2d 1387. These opinions and judgments are set forth in the separately bound appendix to this Petition.

JURISDICTION OF THE COURT

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review, by writ of certiorari, the judgment of the United States Court of Appeals for the Seventh Circuit, which was entered on August 5, 1987. Petitioners' request for rehearing was denied on September 30, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, art. III, section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of The United States, . . .

Constitution of the United States, first amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, fourteenth amendment, section 1:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the extensive patronage hiring system which characterizes the political process in Cook County, Illinois. By that system hiring for many thousands of public jobs is conditioned on active political support for a single political group – the Cook County "regular" Democratic organization. Persons who openly support competing candidates are excluded from consideration for those jobs.

This case, brought on behalf of classes of independent candidates and their voter-supporters, seeks declaratory and injunctive relief with respect to defendants' patronage hiring practices. It is brought on the ground that the patronage hiring system is so extensive that it materially burdens the ability of disfavored candidates and voters to obtain support and purposefully places them at a substantial electoral disadvantage. The district court concluded that this violates petitioners' rights to freedom of association and speech, and to equal protection of the law, as guaranteed by the first and fourteenth amendments. Jurisdiction for the case is founded on 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343(3) (civil rights).

The Complaint

The judgment of the court of appeals reversed the district court and dismissed petitioners' patronage hiring claims without an evidentiary hearing. Accordingly, particular attention to the allegations of the complaint and to petitioners' factual submissions is required.

The complaint is brought by petitioners Michael L. Shakman, an independent candidate (not supported by the "regular" organization of a political party) for delegate to the Illinois Constitutional Convention, and by Paul M. Lurie, a voter and one of Mr. Shakman's supporters. It is brought by them individually and on behalf of classes of independent candidates for public office in elections in Cook County, and of their voter-supporters.

The defendants include local governmental employers who, the complaint alleges, have acted in concert to condition jobs on active support of the "regular" Democratic organization. Among these defendants are the City of Chicago, its park district, various elected officials of Cook County government (including the President of its Board of Commissioners, the State's Attorney, the County Clerk, the Sheriff, the Assessor, the Treasurer and the Clerk of the local Circuit Court) and the county's Forest Preserve District. The Democratic County Central Committee of Cook County, a party organization, and its members are also defendants.

The complaint alleges that defendants and their predecessors have long maintained an employment system in which getting and keeping many thousands of public jobs depend on providing active political support for the favored party organization. This includes making financial "contributions" to that organization (often a percentage of an employee's salary) and doing precinct political work on behalf of officially favored candidates for public office. The jobs are not policy making positions but are generally of a labor, clerical or ministerial nature (such as truck drivers, hospital workers and tax clerks). Political considerations are not just "taken into account"; jobs are conditioned on political support. Persons who openly support competing candidates are excluded from consideration for those jobs. [Appendix, 46a]

This system of politically conditioned employment is alleged to burden the ability of independent candidates and their voters to obtain political support. By excluding those who would openly support disfavored candidates from consideration for public employment, the State significantly hampers the ability of those disfavored candidates and voters to enlist support and to make known their views. [47a]

It is also alleged that this patronage system discriminates against petitioners by granting favored candidates

of the "regular" organization a substantial electioneering advantage. The system produces a vast assembly of precinct workers, as well as a large campaign treasury, for candidates of the "regular" Democratic organization. Campaign funds and precinct work are, of course, important to success in elections. The result is a massive electioneering effort in numerous local elections on behalf of the "regular" organization's candidates for public office, all to the substantial disadvantage of competing candidates and their voters. [46a-47a]

The impact of this patronage hiring system on electoral outcomes is alleged to be very significant. Independent candidates are placed at a substantial disadvantage in developing campaign support, especially as constrasted to the massive electioneering effort which the system produces for candidates of the officially favored party organization. For many elections the disadvantage is decisive. For example, Mr. Shakman lost his election by fewer votes than the number of patronage employees in his district. Indeed, the system is alleged to have been instrumental in producing the long-standing dominance of the regular Democratic organization in local elections in Cook County. [46a-47a]

The complaint alleges that defendants' exclusionary employment system abridges petitioners' constitutional rights to freedom of association and speech because it uses the coercive power of the State to prevent disfavored candidates and voters from being able to enlist support. The State penalizes lawful political association by excluding those (including independent voters themselves) who openly support petitioners. Moreover, the system denies petitioners' rights as candidates and voters to equal protection of the law. State power is used to advantage the fortunes of a single political organization by conditioning jobs on active support of its favored candidates, for the purpose of placing petitioners at a substantial competitive disadvantage. [46a-47a]

The Initial Decision Of The Court Of Appeals

The complaint was initially dismissed by the district court. That decision was reversed by the court of appeals in a decision which is not now under review. That decision held that the complaint stated a claim upon which relief may be based concerning misuse of official power over public employees:

> It is clear that at least some aspects of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.
>
> . . . .
>
> . . . The interest [of candidates and voters] in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

[38a-39a] Correspondingly, it also held that petitioners had standing to bring those claims. *Id.*

The Initial Consent Decree

Upon remand to the district court, the case was certified as a class action on behalf of the classes of independent candidates for public office in Cook County (that is, candidates not supported by a regular party organization) and of their voter-supporters.

Defendants, including each of the respondents, subsequently agreed to a consent judgment that enjoins defendants from basing or affecting any term or aspect of public employment, with respect to persons *once hired*, upon political reasons or factors (except for certain exempt positions).

That final judgment, which is not now in issue, does not, however, resolve whether petitioners are entitled to relief with respect to defendants' hiring practices. The judgment specifically provided that the court retained jurisdiction to resolve the hiring claim. [121a *et seq.*]

Motion For Summary Judgment

Petitioners then moved for partial summary judgment as to liability with respect to defendants' continuing patronage hiring practices.

The basic facts of the case are not in issue. Defendant public employers admit (in a series of stipulations and responses to requests for admissions) that hiring for at least 20,000 local public jobs in Cook County is based or conditioned on active support of the "regular" Democratic organization. In fact, respondents themselves admit that hiring for the majority of jobs under their jurisdiction is politically based. [According to the current county budget, respondents alone employ about 15,000 persons.] To get one of these patronage jobs (or, having one, to get a better position) an applicant or employee must provide or promise active political support for candidates of the "regular" organization. [54a-56a]

Respondents admit, moreover, that persons who in any way openly support independent candidates are excluded from consideration for these jobs. [55a]

Respondents admit that the purpose of the politically conditioned hiring system is to provide a campaign advantage for candidates of the "regular" organization. This, it is admitted, helps those candidates win elections. Officials of the Democratic organization also admitted that their ability to obtain campaign workers needed to win elections depends upon their continued access to politically conditioned hiring for public jobs. [55a-56a]

Affidavits submitted in support of petitioners' summary judgment motion emphasize the extent to which

independent candidates and voters are disadvantaged by the patronage hiring system.[1] In lower visibility local elections, precinct work and campaign funds are especially important to electoral success. Indeed, they are often the most significant factors in determining who wins. The massive patronage hiring system produces large numbers of campaign workers (as well as financial "contributions") for favored candidates (while preventing support for disfavored candidates). It gives favored candidates a substantial and often decisive electioneering advantage over independent candidates who have no patronage jobs to award. This has led to a dominance of the "regular" organization in local elections. [47a-48a, 97a-100a, 149a-150a]

Decision of The District Court

The district court granted summary judgment on liability for petitioners. Extensive findings of fact, based on defendants' stipulations and admissions, describe the operation and effect of the patronage hiring system. The court found that defendants maintain a massive patronage system in which hiring is based on active political support (money and precinct work) for the "regular" Democratic organization. The court found that anyone who has "in any open way been a worker or partisan of any political group opposed to or by the regular Democratic organization of the sponsor" is usually excluded from consideration for patronage jobs. [148a]

The system was found to result in a significant electoral disadvantage to independent candidates.

> The patronage employment system described above helps regular Democrats win elections. It

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[1] Because the court of appeals dismissed petitioners' claims without an evidentiary hearing, the matters set forth in petitioners' supporting affidavits must, at this stage of the case, be taken as true. Rule 12(b), FED. R. CIV. P; *Gardner v. Toilet Goods A'ssn*, 387 U.S. 167, 172 (1967).

> provides a significant advantage in Chicago and in Cook County, Illinois, to candidates supported by the regular Democratic organization and a corresponding disadvantage to opposing candidates. . . .

[149a-150a] This is, of course, its purpose. [55a-56a]

In an extensive analysis of the legal issues, the district court concluded that defendants' political hiring system abridges petitioners' first and fourteenth amendment rights. [109a,119a] The district court concluded that, by excluding those who openly support disfavored candidates from consideration for public employment, the political hiring system unconstitutionally burdens petitioners' freedom of association and speech. It concluded that the intentional use of state power to grant a significant electioneering advantage to a favored political group over competing candidates deprives petitioners of equal protection. By using its coercive power in this way, the State discriminates among candidates and voters solely on the basis of the content of political speech, in violation of the first amendment. [70a-75a]

After a hearing on the proper relief, the district court entered a judgment enjoining defendants from basing hiring on political considerations (except for exempt positions). [151a-161a][2] Seeking to continue their exclusionary hiring practices, respondents appealed from the district court's judgment.

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[2] A number of defendant public employers, including the City of Chicago, its park district and several Cook County officers, have agreed to discontinue their political hiring practices (except for exempt positions). Separate consent decrees supplanting the court's judgment have been entered with respect to these consenting defendants. Those defendants have taken major steps pursuant to the consent decrees to recast their hiring systems so that they are based on factors other than political support. [4a]

The Decision Of The Court Of Appeals As To Which Review Is Sought

The court of appeals reversed the district court's judgment and dismissed petitioners' claims with respect to respondents' hiring practices. [25a] It ruled that, as a matter of law, politically conditioned hiring cannot infringe the rights of candidates and voters. This is because, it concluded, such a system is inherently neutral; whoever wins an election can engage in the same practices. [20a-23a]

The court of appeals also ruled that petitioners do not have standing, as required by the "case" or "controversy" language of the Constitution, to complain of respondents' politically exclusionary hiring practices.[3] The court reasoned that, since many factors influence individual decisions as to political support, no injury to petitioners' interests can be traced with certainty to the State's conduct in conditioning hiring on support of a favored political group. Moreover, the court ruled, since the system does not completely restrict the ability of competing candidates to obtain support, the impact of any burden on petitioners' ability to obtain support is limited. [20a-24a]

REASONS FOR GRANTING THE WRIT

There are two basic reasons *certiorari* should issue in this case. *First*, the substantive issue – the constitutionality of a politically conditioned hiring system that purposefully disadvantages disfavored candidates and their voter-supporters – is of very considerable importance. It involves fundamental rights to a free and competitive political process which are at the heart of our constitutional system. And the actual, practical impact is significant, as practices

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[3] The court concluded that its earlier decision in the case was not determinative of the issue because it did not deal with patronage *hiring* practices and because the law of standing had been recast since that decision.

similar to those in issue here affect the rights of millions of voters and hundreds of candidates in numerous local elections around the country to a free and competitive electoral system.

Second, the holding of the court of appeals that the case is not justiciable presents an issue which should be resolved by this Court. The holding would bar judicial consideration of the burdens on political competition imposed by any system of patronage hiring, no matter how extensive. Moreover, the rationale of the decision of the court of appeals would expand the standing requirement to establish a barrier to judicial consideration of virtually all claims concerning state action burdening political competition. The decision, with its narrow vision of judicial authority, thus raises fundamental questions as to the ability of the judiciary to protect constitutional rights concerning the political process.

I. THE CONSTITUTIONALITY OF PATRONAGE HIRING THAT SIGNIFICANTLY BURDENS POLITICAL COMPETITION IS IMPORTANT FOR RESOLUTION BY THIS COURT.

This Court has twice in recent years considered the constitutionality of patronage employment practices. In *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that the firing of public employees because of party affiliation is unconstitutional.

The opinions in those cases strongly indicate that politically conditioned *hiring* is of doubtful constitutionality, especially when conducted on a scale which affects the electoral process.[4] The holdings in those cases, however, were

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[4] In *Branti*, the opinion of the Court noted that "it is difficult to formulate any justification for tying *either the selection or retention* of an assistant public defender to his party affiliation." 445 U.S. at 520 n.14 (emphasis supplied). The dissent cited this

(Footnote continued on the following page)

limited to the legality of political discharges. The issue presented here – the constitutionality of a system of patronage hiring that is designed to burden political competition – has not been clearly resolved by this Court.[5]

This case squarely presents that issue. The district court found the system of political hiring in Cook County to be so extensive as to have a significant effect on the results of elections. Thus, this case concerns the situation in which the impact of a system of politically conditioned hiring is most critical – where it affects the free functioning of the democratic process. The case is particularly suitable for review since it affords the Court an opportunity to review the constitutionality of patronage hiring insofar as it burdens the electoral system, without necessarily reaching the question whether isolated or individual instances of politically motivated hiring decisions are lawful.

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4 *(Continued)*
footnote in concluding that the decision "further limits the relevance of political affiliation to the *selection* and retention of public employees." *Id.* at 521 (emphasis supplied). *See also id.* at 522 n.2. The plurality opinion in *Elrod* also commented on the adverse effect patronage hiring practices may have on the democratic process. *Elrod*, 427 U.S. at 356, 369-70.

[5] Numerous law review articles conclude that political hiring is unconstitutional. *See, e.g.*, Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181, 200 (1982); Note, 29 EMORY L. J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374 (1987).

The treatment of the issue in the lower courts is diverse. *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986), holds that only hiring based solely on politics is unconstitutional. In *Rosenthal v. Rizzo*, 555 F.2d 390, 392

(Footnote continued on the following page)

A. Fundamental Rights Concerning A Free And Competitive Electoral System Are At Issue.

Politically conditioned hiring by the State, where extensive, affects constitutional rights with respect to the electoral process in two important ways. First, by excluding anyone who openly supports independent candidates from consideration for employment, the State purposefully burdens the ability of those candidates to obtain support (as well as the ability of independent voters to give that support), all in violation of their freedom of association and speech. Second, by providing campaign assistance solely for a favored political group, the State denies the equal protection of the law to competing candidates and their voter-supporters.

1. Freedom of association and speech of disfavored candidates and their voters is abridged when the State uses its coercive power to prevent active support of those candidates.

The imposition by the State of discriminatory burdens on the ability of disfavored candidates and voters to

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5 *(Continued)*

(3d Cir.), *cert. denied,* 434 U.S. 892 (1977), the Third Circuit stated that political hiring is unconstitutional. A different panel subsequently indicated that this was *dictum* and not binding. *Mazus v. Dept. of Transp.*, 629 F.2d 870 (3d Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981). District courts are in disagreement. A number of cases hold that political hiring is unconstitutional: *Indiana State Employees Ass'n v. Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194 (S.D. Ind. 1986); *Gomez v. South Bend,* 605 F. Supp. 1173 (N.D. Ind. 1985); *Torres v. Grunkmeyer,* 601 F. Supp. 1043, 1047 (D. Wyo. 1984); *Cullen v. New York State Civil Service Comm'n,* 435 F. Supp. 546, 551-52 (E.D. N.Y.), *appeal dismissed,* 566 F.2d 846 (2d Cir. 1977). On the other hand, *Rutan v. Republican Party,* 641 F. Supp. 249 (C.D. Ill. 1986) (appeal pending), and *Messer v. Curci,* 610 F. Supp. 179 (E.D. Ky. 1985) (appeal pending), reach the opposite result.

enlist active support violates their basic freedom of association and speech. As this Court has repeatedly affirmed, rights of political association of citizens are abridged when the State burdens the ability of others to associate with them. It takes two to associate. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958), this Court held that burdens which "dissuade others from joining" a group abridge the first amendment rights of group members. *See also Tashjian v. Republican Party*, ___ U.S. ___, 107 S. Ct. 544 (1986), where this Court recently held that freedom of political association of voters who are party members is abridged by the State's exclusion of independent voters from the party's primary elections.

A significant burden is imposed on the rights of independent candidates (and their voters-supporters) when the State excludes those who openly support them from the opportunity for public employment. The ability of those disfavored candidates and voters to enlist support or to express views is thus significantly burdened. Independent voters know that if they provide open support for independent candidates, they will be black-listed. This is a particularly effective method for the State to control political association and speech. Jobs are important to people; employment opportunity is not easily given up for the sake of a campaign.

The plurality opinion in *Elrod* recognized this impact of political hiring on first amendment rights:

> Conditioning public employment on partisan support *prevents support of competing political interests*. Existing employees are deterred from such support, *as well as the multitude seeking jobs*.
>
> . . . .
>
> . . . [P]atronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied). The district court found that respondents' patronage hiring system has precisely that effect in terms of burdening petitioners' rights of association and speech. [70a-74a]

2. Equal protection is denied when the State uses its control over employment to tip the electoral scales.

For the electoral system to be free and competitive, it is essential that the State not tip the electoral balance by providing electioneering assistance solely for candidates it favors. *Buckley v. Valeo*, 424 U.S. 1, 99 (1976). Politically conditioned hiring, where substantial, however, has precisely that discriminatory effect. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers.... Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.
>
> . . . .
>
> ... Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369. This point in *Elrod* was summarized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

In contrast to the analysis in *Elrod*, the decision of the court of appeals asserts that politically conditioned hiring is, as a matter of law, politically neutral. This is said to be true because any candidate who wins elections can engage in the same practices. [20a] This reasoning is amiss. An extensive political hiring system, with various employers acting in concert, plainly favors the political faction that controls the jobs. That is its whole point – to use control

over jobs to keep the "outs" from ever becoming the "ins."

In any event, it hardly can be maintained that equal protection of the law may be achieved merely because anyone able to get the upper hand can engage in similar discriminatory conduct. Such an argument would be available to defend almost any discriminatory practice.

B. The Issues Are Important To The Rights Of Millions Of Voters In Numerous Elections Around The Country.

The considerable practical significance of patronage hiring practices makes the case particularly important for resolution by this Court. The issues presented by the present case have broad national applicability. Political life in a number of jurisdictions, especially in cities in the East and in parts of the Midwest, is characterized by extensive use of patronage hiring, with jobs conditioned on political support. *See, e.g.*, R. Wolfinger, *Politics of Progress* at 87-92 (1974); Wolfinger, *Why Political Machines Have Not Withered Away and Other Revisionist Thoughts*, 34 J. POL. 365 (1972). Extensive patronage hiring systems reduce political competition, burden opportunities of disfavored candidates to attract support and tip the electoral scales.

The issues in this case thus affect the rights of millions of voters in jurisdictions around the country to a free electoral system. The outcomes of hundreds of elections for countless local governmental positions are affected by the practices in issue in this case.

II. THE DECISION OF THE COURT OF APPEALS WOULD INSULATE FROM JUDICIAL REVIEW STATE ACTIONS WHICH BURDEN SUPPORT OF DISFAVORED CANDIDATES AND VOTERS OR WHICH PURPOSEFULLY FAVOR CANDIDATES OF A SINGLE POLITICAL GROUP.

The holding of the court of appeals that petitioners do not have standing presents an exceptionally important

issue that should be resolved by this Court. It constitutes a ruling that patronage hiring cannot abridge constitutional rights of disfavored candidates and voters – no matter how much such a system in fact burdens electoral opportunity. Moreover, the rationale of the decision would expand the standing requirement to exclude judicial consideration of a wide range of state practices designed to tip the electoral scales or to burden the ability of disfavored groups to enlist support. The case thus presents basic issues as to the extent to which the standing requirement constitutionally restricts the judiciary from protecting rights to a free political process.

Petitioners plainly have standing under prevailing law, rooted in the "case" or "controversy" language of article III of the Constitution. The allegations of the complaint (as well as the findings of the district court) describe in detail the substantial injury to the interests of disfavored candidates and voters that is the direct result of respondents' patronage hiring system. For example, petitioners' ability to enlist campaign support is materially disadvantaged by respondents' practice of excluding from consideration for public employment anyone (including members of the class of independent voters) who openly supports independent candidates.

The system further puts disfavored candidates and voters at an electoral disadvantage by providing massive electioneering support for candidates favored by the "regular" party organization. Respondents admit that the purpose of the system is precisely to give that advantage to favored candidates over petitioners. As the complaint alleges, and the district court found, the disadvantage to disfavored candidates is substantial and, indeed, often decisive in electoral outcomes.

The court of appeals ruled, however, that petitioners lacked standing because, it asserted, no injury to candidates and voters could be traced with sufficient certainty

to politically conditioned hiring. It did not dispute that the patronage hiring system may place petitioners at an electioneering disadvantage. It reasoned, however, that the effects of the political hiring system may be outweighed by other legitimate factors affecting individual decisions as to political support. And, with respect to burdens imposed by the system on petitioners' own abilities to obtain support, the court noted that such support was not "completely" restricted; petitioners can still seek support from voters disinterested in the possibility of public employment.[6] [20a-24a]

The decision of the court of appeals is thus not so much a decision that petitioners are not injured by the system. It is, rather, a ruling that candidates and voters have no constitutional rights which can be impaired by a system of politically conditioned hiring, no matter how extensive, because the disadvantage can in some cases be overcome.

The direct effect of the decision is to preclude judicial review of the effect of any system of patronage hiring on the rights of candidates and voters, regardless of the extent of its actual impact. The decision thus excludes from review a practice whose "impact on the political process" has been described as "at war with the deeper traditions of democracy embodied in the First Amendment" in instances in which that impact is most significant. *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972) (Stevens, J.), *cert. denied*, 410 U.S. 928 (1973).

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[6] The court considered any injury speculative because any political activity produced by patronage hiring was said to depend on numerous "independent" decisions of patronage employees (or applicants). This wholly misapprehends the case. Decisions of patronage employees and applicants to provide political support are hardly *independent;* they are *required* by the State. Nor is the result speculative. Political work is a job requirement. Moreover, petitioners' ability to obtain support is burdened regardless of support produced for officially favored candidates.

This result is flatly contrary to existing decisions of the Court. Voters have been held entitled to challenge state burdens on the ability of other persons to associate with them (quite apart from any showing of actual electoral harm). *Tashjian v. Republican Party*, ___ U.S. ___, 107 S. Ct. 544 (1986). Since *Baker v. Carr*, 369 U.S. 186 (1962), voters have been held to have standing to challenge state established competitive disadvantages in the electoral system. This has been explicitly held to apply to state created electioneering disadvantages. *Buckley v. Valeo*, 424 U.S. 1 (1976).

The court of appeals' decision, moreover, has more far reaching application. It would expand the standing requirement to establish a significant barrier to judicial consideration of a wide range of state practices concerning the electoral process. The court's conclusion that no injury can be traced to the practices in issue because their effect may be outweighed by other factors would apply as well to virtually all state efforts to advance the electoral fortunes of favored candidates. It would exclude judicial consideration of state granted electoral advantages unless they are so severe as to be essentially impossible to overcome. This would give the State enormous leeway purposefully to deny to the political process (and more generally to the marketplace of ideas) a "level playing field."

Similarly, the court's conclusion that standing does not exist to challenge state-imposed burdens on support of disfavored candidates because that support is not "completely restricted" has broad application. The court's analysis would exclude judicial review of virtually all burdens imposed on a candidate's ability to garner support short of banning a candidancy completely.

This narrowing of the range of justiciability would exclude judicial consideration precisely when it is most important. State actions which burden association with disfavored groups or which tilt the electoral scales for

favored parties tend to be self-perpetuating in nature, not easily susceptible to electoral correction. *Baker v. Carr*, 369 U.S. 186 (1962). Protection of the democratic political process from such burdens is a key responsibility of the federal judiciary. *The Federalist* No. 78 (A. Hamilton).

In a long series of cases since *Baker v. Carr*, this Court has considered the constitutionality of a variety of constraints on the free functioning of the political process. The decision of the Seventh Circuit, however, expands the standing requirement to establish a free-floating barrier against claims that the State unconstitutionally burdens support for disfavored candidates or provides electioneering assistance only for a favored political organization. Review by this Court is needed to consider whether the "case" or "controversy" requirement is now to be interpreted to exclude from judicial review practices, such as those involved here, which profoundly impair the free functioning of the electoral process.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,
Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, Illinois, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 85-1870, 85-1911, 85-1912
MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,
Plaintiffs-Appellees,

v.

GEORGE W. DUNNE, et al.,

and

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

and

DEMOCRATIC PARTY COUNTY CENTRAL COMMITTEE FOR COOK COUNTY AND ITS MEMBERS, et al.,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 69 C 2145–Nicholas J. Bua, *Judge.*

Argued February 25, 1986–Decided August 5, 1987

Before Flaum and Ripple, *Circuit Judges,* and Eschbach, *Senior Circuit Judge.*

Ripple, *Circuit Judge.* At issue in this class action is the constitutionality of the patronage hiring system main-

tained by the appellants in Cook County, Illinois. The appellees are independent candidates, independent voters, and taxpayers who allege that the appellants' policy of using political "sponsorship" as a factor in determining who receives a Cook County government job, creates a substantial electoral advantage for the incumbent political office holder and, in doing so, violates the appellees' constitutional rights. The district court granted the appellees' motion for partial summary judgment on the issue of liability.[1] *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315, 1355 (N.D. Ill. 1979). For the reasons set forth in the following opinion, we reverse.

I
Facts

In 1969,[2] Michael Shakman was an independent candidate seeking election as a delegate to the 1970 Illinois Constitutional Convention. Prior to the election, Mr. Shakman and Paul Lurie, a voter supporter, filed this lawsuit on behalf of themselves and all other independent candidates, independent voters and taxpayers in Cook County, Illinois. The complaint alleged that various government agencies and officials in the City of Chicago and Cook County maintained and conspired to maintain a policy of

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[1] Appellees' motion for partial summary judgment as to the appellants' liability was granted on September 24, 1979. *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979). The remedy was left for later determination. On April 4, 1983, the district court entered the implementation order applicable to the hiring aspect of the case. Finding no just reason for delay, the district court ordered the entry of judgment pursuant to Fed. R. Civ. P. 54(b). Final judgment was thus entered as to the hiring practices of the consenting defendants who are before this court as the appellants. This court's jurisdiction is based on 28 U.S.C. § 1291.

[2] This litigation has been in progress since 1969. In this opinion, we set forth only the facts and procedural history relevant to the issues before the court.

hiring and retaining only those people who had received political sponsorship. The necessary sponsorship was usually obtained only on the basis of past political support or promises of future support for candidates endorsed by the Democratic Party. This support allegedly included both political contributions and political work on behalf of those candidates selected by the Democratic Party. Lack of sponsorship made employment unlikely and loss of sponsorship often resulted in dismissal. The plaintiffs alleged that this system of hiring and firing based on political sponsorship created an army of political workers and campaign funds that were not available to candidates who did not receive the endorsement of the Democratic Party. The plaintiffs argued that this system created a governmentally-maintained advantage for one political party. The complaint sought relief under 42 U.S.C. §§ 1983, 1985, 1986 and 1988 for violation of the plaintiffs' rights protected by the first, fifth and fourteenth amendments.

Before the election, in 1969, the district court dismissed the complaint. *Shakman v. Democratic Org. of Cook County*, 310 F. Supp. 1398 (N.D. Ill. 1969). The district court held that the plaintiffs lacked standing to assert the rights of Democratic patronage employees and that any allegations that the harm done to the patronage employees also harms the plaintiffs are "too conclusory to support a cause of action upon which relief may be granted." *Id.* at 1402.

A divided panel of this court reversed that decision and remanded the case for further proceedings. *Shakman v. Democratic Org. of Cook County*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971) (*Shakman I*). The panel first noted that, although the election had already been held, the practices challenged in the complaint were of a continuing nature and, therefore, the case was not moot. *Id.* at 268. The majority concluded that "the averments concerning the operation of the patronage system

and the disadvantage it causes to candidates and voters who attempt to use the election process to change the direction of government are factual and give adequate fair notice of the claim asserted." *Id.* at 270. Relying on cases that involved the mechanics of the election process, the panel held:

> The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

Id. Finally, the panel decided that the allegations did not present non-justiciable questions. *Id.* at 271. Chief Judge Swygert dissented on the ground that the case raised a non-justiciable political question not amenable to "'judicially discoverable and manageable standards.'" *Id.* at 272 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Following the remand, the parties entered into negotiations that produced a consent judgment entered on May 5, 1972. R.42; Consent Decree (May 5, 1972).[3] This judg-

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[3] Most of the Democratic defendants ultimately agreed to the 1972 consent judgment. Cook County Sheriff, Richard Elrod, and the Chicago Park District remained the only "non-consenting" Democratic defendants. *Shakman*, 481 F. Supp. at 1323. The district court entered partial summary judgment against the "non-consenting" defendants as to liability on the issues of political hiring, firing and promotion practices. *Id.* at 1349. The "non-consenting" defendants have not appealed. After partial summary judgment was entered, but before the 1983 implementation order, the "non-consenting" Democratic defendants entered into separate consent decrees approved by the district court. All the appellants before this court had consented to the 1972 consent judgment prohibiting political firing. Therefore, the only issue before this court is the constitutionality of the hiring policy.

ment prohibits the defendants from "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." R.42 at 4. The parties also agreed that they would continue to litigate the issue of whether political sponsorship or other political considerations could be considered in hiring new employees. *Id.* at 5.

Attempting to resolve the remaining hiring issue, the plaintiffs submitted requests to admit. Each defendant filed an almost identical response. R.89; R.90; R.103; R.105; R.106; R.108. Essentially, the defendants admitted that many departments and agencies in Cook County gave preference in hiring for many county jobs to those persons who had received political sponsorship from a Democratic Party official. Most of the jobs involved were not policy making positions and generally no public notice was given for those openings. The positions were normally classified as "temporary" despite the fact that many employees remained in them for years. The "temporary" status removed the job from the protection of the civil service statutes. The defendants also admitted that they believed that sponsorship was usually contingent on past political work or the expectation of political work in the future. The defendants also believed that a significant number of persons sponsored did some political work on behalf of candidates supported by the Democratic Party. Finally, the defendants admitted that they believed that this work helped elect candidates and that this perceived political advantage was one of the reasons that preference in hiring was given to those who had obtained sponsorship. Based on these admissions, affidavits, testimony from political science experts, transcripts from prior proceedings, and election results, both the plaintiffs and the defendants filed motions for summary judgment.

On September 24, 1979, the district court granted the plaintiffs' motion for partial summary judgment on the issue of liability. In a lengthy opinion, discussed in detail below, the district court concluded that the patronage hiring practice infringed upon the plaintiffs' rights protected by the first and fourteenth amendments. According to the district court, the record supported the plaintiffs' allegations that the government's hiring policy gave the Democratic candidates "an actual, significant advantage in elections." 481 F. Supp. at 1355. The policy purposefully discriminated against the plaintiffs and the government had failed to provide a compelling interest furthered by the challenged practice. *Id.* The district court declared the patronage hiring practice unconstitutional.

The court deferred the issue of an appropriate remedy; therefore, it did not immediately enter a final judgment.[4] Instead, discussions concerning the appropriate remedy continued until April 4, 1983, when the district court entered judgment permanently enjoining the defendants from "conditioning, basing or knowingly prejudicing or affecting the hiring of any person as a Governmental Employee (other than for Exempt Positions), upon or because of any political reason or factor...." R.231 at 4. Defendants, George Dunne, President of the Board of Commissioners of Cook County; Stanley Kusper, Jr.,

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[4] The district court invited the parties to seek the certification of the interlocutory summary judgment order necessary for an immediate appeal pursuant to 28 U.S.C. § 1292(b). 481 F. Supp. at 1355 n.51. The Democratic defendants filed a motion to have the summary judgment order certified for appeal under Fed. R. Civ. P. 54(b). R.190; Order of Mar. 5, 1981 at 2. The district court denied the motion but certified the summary judgment order for appeal pursuant to 28 U.S.C. § 1292(b). *Id.* The defendants filed a notice of appeal on March 16, 1981. R.191. The appeal, however, was dismissed by this court pursuant to the defendants' motions. R.193; R.194.

the Cook County Clerk; Thomas C. Hynes, Assessor of Cook County; the Forest Preserve District of Cook County; the Democratic Party County Central Committee for Cook County and its members; and Edward R. Vrdolyak, filed notices of appeal.[5] R.306; R.309; R.310. To evaluate their arguments on appeal, we must first examine the district court's opinion on entry of partial summary judgment for the plaintiffs.

II
District Court's Opinion

The district court began its analysis by rejecting the defendants' argument that granting any type of relief to the plaintiffs would interfere with the conduct of state government or violate the principles of comity and federalism. 481 F. Supp. at 1326-27. The court also rejected the plaintiffs' argument that the Supreme Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), required the court to grant their motion for summary judgment. 481 F. Supp. at 1327-28. The court recognized that both the plaintiffs and the patronage practice at issue in this case differed from those in *Elrod*. After disposing of these preliminary arguments, the district court began searching for a legal framework within which to evaluate the plaintiffs' allegations.[6]

Focusing first on the earlier opinion of this court, the district court noted that, although this court had held that the Constitution protected the interests involved in this

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[5] *See supra* note 3.

[6] The district court also held that the plaintiffs lacked standing as taxpayers to challenge the patronage hiring practice. 481 F. Supp. 1315, 1322 n.1. We agree with the district court; the counts based on taxpayer standing are, therefore, dismissed. *See Frissell v. Rizzo*, 597 F.2d 840, 850 (3d. Cir.), *cert. denied*, 444 U.S. 841 (1979) (applying *United States v. Richardson*, 418 U.S. 166 (1974), to a suit brought in federal court by a local taxpayer challenging the constitutionality of a local government expenditure).

case, it did not precisely identify the protected constitutional rights.[7] The plaintiffs' complaint alleged violations of the first and fourteenth amendments. Therefore, the court turned to other Supreme Court and Seventh Circuit precedent in search of an appropriate framework for evaluating the constitutional claims.

As a result of that search, the district court identified three separate rights protected by the first and fourteenth amendments which, in the court's view, are at issue in this case. First, the court concluded that "[t]o the extent that the allegations of the present complaint are true, . . . the defendants have clearly burdened the plaintiff candidates' rights of free political belief and expression." *Id.* at 1333. Because the district court believed that the patronage hiring policy impeded the plaintiffs who chose to run against the Democratic Party, the court considered the policy a content-based restriction on speech. *Id.* The second constitutional interest identified by the district court involved the plaintiffs' right to associate with the political party of their choice. Analogizing the patronage hiring policy with a ballot restriction that has the effect of excluding certain candidates, the district court concluded that, if the allegations were true, the hiring policy had rendered the associational rights of both the candidates and the voters less valuable.

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[7] The district court wrote:

> There are two apparent gaps in the opinion that make analysis difficult. First, while there is general discussion of the protected nature of "the voter's interest in a voice in government of equal effectiveness with other voters" and a right of some sort to protection "from injury resulting from inequality in election procedure," these rights do not appear to be precisely defined and their scope is not stated. Second, while the court of appeals repeatedly used the phrase "constitutional protection," it did not define the nature of that protection.

481 F. Supp. at 1330.

Id. at 1334. Finally, the district court decided that the patronage hiring policy deprived both the candidates and the voters of their right to "equal participation in the electoral process." *Id.* Not only are the candidates' rights to have an equal chance to win the election infringed by the patronage system but also "[t]he state is alleged to work against and make more difficult the election of certain candidates. To the extent this is true, . . . the value of the votes of those supporting those candidates, in terms of their ability to affect the outcome of an election is lessened." *Id.* at 1335.

After isolating these three constitutional rights, the district court concluded that all the rights could be evaluated under the constitutional standards set forth in the ballot placement cases. *See Board of Election Comm'rs v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied*, 442 U.S. 918 (1979); *Bohus v. Board of Election Comm'rs*, 447 F.2d 821 (7th Cir. 1971).

> Ballot placement cases . . . involve allegations of governmental interference with the equality of the electoral process in a manner and to a degree similar to that charged in the present case. In ballot placement cases, unlike ballot access cases, the government has not excluded any candidate or candidates from the electoral process. Instead, the government is charged, as in the present case, with acting so as to favor, to some relatively small degree, certain candidates because of their political affiliation.

481 F. Supp. at 1335. Therefore, the court adopted the two-part test established in these cases. "Once a plaintiff shows (1) an intentional discrimination by the government on the basis of his or her political beliefs that gives (2) an actual significant advantage in an election to his or her opponent . . . he or she has demonstrated an infringement of that right." *Id.* at 1338. The burden then shifts to the government to demonstrate that the practice is necessary to the achievement of a compelling government interest.

The district court recognized that this *Bohus* test did not take the element of voluntary political work into consideration. The court also noted that the earlier opinion from this court may have indicated that coercion was an essential part of the plaintiffs' case. *Id.* at 1340. However, on the basis of its reading of more recent Supreme Court and Seventh Circuit cases, the court concluded that coercion was not relevant. "The plaintiffs need only show that the government, in sponsoring the patronage system, is purposefully discriminating against them on the basis of their political beliefs, and that the system provides regular Democrats with 'an advantage' in elections that they would not otherwise have." *Id.* at 1341.

Applying the two-part *Bohus* test to the facts in this case, the district court concluded that the admissions made by the defendants resolved any genuine issues of material fact. The court noted that the defendants had admitted that at least one of the reasons they gave preference in hiring to those who had received sponsorship, was to help elect Democratic candidates. This admission, the court concluded, established the intent to discriminate. Focusing on the defendants' statement that "[t]his political precinct work helps elect candidates supported by the various members of the Democratic County Central Committee," the district court decided that the defendants' admissions also established that the patronage system created an actual significant advantage in elections. *Id.* at 1345-46. The court refused to consider affidavits, submitted by the defendants, from political scientists who concluded that the patronage system had little or no impact on election results, because the court concluded that this evidence was inconsistent with the admissions. *Id.* at 1346 n.35.

Having determined that both parts of the *Bohus* test were met, the court applied strict scrutiny to the government's policy and required the defendants to establish a compelling governmental interest to justify the patronage

hiring practice. *Id.* at 1349-54. The court found the record devoid of any compelling governmental interest that would justify the practice. Therefore, the court granted the plaintiffs' motion for partial summary judgment.

III
The Contentions on Appeal

The appellants have raised several objections to the district court's judgment. As in the first appeal, the appellants challenge the appellees' standing to litigate the constitutionality of the hiring policies. Next, they argue that the ballot placement cases do not provide an appropriate framework for evaluating the constitutional claims in this case. When the appropriate constitutional analysis is utilized, they submit, it becomes clear that no constitutionally-protected rights are infringed by the hiring practices. They also argue that proof of coercion is an essential part of the appellees' case and that the record contains no evidence that coerced political work had any impact on the outcome of elections. Finally, even if the district court has used the proper constitutional analysis, the appellants argue that genuine issues of material fact regarding the actual impact of the hiring practice on elections remain unresolved. The appellants request not only that we reverse the district court's decision to grant the appellees' motion for partial summary judgment but also that we grant appellants' motion for summary judgment.

IV
Discussion

A. *The Standing Requirement: The Need for Reexamination*

The case before us today is, from a *factual* viewpoint, a very different case from the case set forth in the complaint. The consent decree with respect to politically-motivated discharges, R.42; Consent Decree (May 5, 1972), has eliminated a significant portion of the contentions that were originally presented in the appellees' complaint and that

were before this court during the earlier appeal in 1970, seventeen years ago. The combined impact of political hiring and firing practices–a significant part of the plaintiffs' original case–is therefore not before us on this appeal. This appeal raises only the constitutionality of politically-motivated *hiring* practices without any reference to other patronage-based employment practices–including the discharge scheme now forbidden by the consent decree, R.42; Consent Decree (May 5, 1972). More importantly, we are confronted with a significantly different *legal* landscape than the one that confronted the district court at the time the complaint was originally filed in 1969, at the time of the first appeal to this court in 1970, or at the time the district court made the ruling now before us in 1979. During these intervening years, the Supreme Court has engaged in a thorough examination of "justiciability," the limitations imposed on federal courts by the "case-and-controversy" provision of article III.

These changes have made our consideration of the standing issue in this case most difficult. Indeed, one of the unhappy by-products of these changes has been that, with respect to the standing of voters and candidates to challenge hiring practices alone, we have not been able to regard the earlier holding of a panel of this court, dealing with the standing of voters and candidates to challenge the combination of hiring and firing practices, as having the precedential effect that we would normally accord such an earlier ruling of this court in the same litigation. The law of the case doctrine is not to be lightly disregarded. It is "based on the salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967); *see also Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 607-08 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981). *See generally Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481 (1858). However, it must be remembered that this doctrine "was understandably crafted with the course of ordinary litigation in

mind." *Arizona v. California*, 460 U.S. 605, 618-19 (1983). Moreover, the question of justiciability, grounded in the case-and-controversy requirement of article III, is essentially jurisdictional in nature. As this court noted in *Christianson v. Colt Indus. Operating Corp.*, 798 F.2d 1051, 1056 (7th Cir. 1986), courts are significantly less constrained by the law of the case doctrine with respect to jurisdictional questions. Here, where there have been substantial pronouncements in this area since 1970, we are not only free to reexamine the holding of the earlier panel but obliged to do so.

B. *The Standing Requirement: Governing Principles*

Our evaluation of the appellants' submission with respect to standing will be significantly advanced if we remember, as Chief Justice Warren stated in *Flast v. Cohen*, 392 U.S. 83 (1968), that standing is "an aspect of justiciability." *Id.* at 98. "Justiciability," the Chief Justice pointed out, is the "term of art employed to give expression to [the] dual limitation placed upon federal courts by the case-and-controversy doctrine." *Id.* at 95. This doctrine, at the heart of our constitutional concept of judicial power, embodies "two complementary but somewhat different limitations:"

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

Id. These policy concerns must guide our application of the analytical formula that the Supreme Court has developed with respect to standing.

The basic criteria for standing have been set forth

by the Supreme Court in many cases. Perhaps the most comprehensive is Justice O'Connor's statement in *Allen v. Wright*, 468 U.S. 737 (1984), that sets forth the three elements of the standing analysis: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). *See generally Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).[8]

The second criteria–that the injury be "fairly traceable" to the challenged action–is an important one if the values underlying the case-and-controversy requirement of article III are to be respected. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury" as a result of the action that forms the basis of the complaint. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Linda R. S. v. Richard D.*, 410

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[8] Some of the earlier standing cases do not clearly delineate the second and third element of the analysis. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). As Justice O'Connor pointed out in *Allen*:

> The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement." C. Wright, Law of Federal Courts § 13, p. 68, n.43 (4th ed. 1983). To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.

Id.

U.S. 614, 618(1973); *Ex parte Levitt*, 302 U.S. 633, 634 (1937). The asserted injury must be shown to be "the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505 (1975). *See generally Meese v. Keene*, 107 S. Ct. 1862 (1987); *South E. Lake View Neighbors v. Department of Housing and Urban Dev.*, 685 F.2d 1027 (7th Cir. 1982). "[U]nadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44; *see also Linds R.S.*, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."). "[T]he remote possibility, unsubstantiated by allegations of fact, that [the plaintiffs'] situation might have been better had [the defendants] acted otherwise, and might improve were the court to afford relief," *Warth*, 422 U.S. at 507, is simply insufficient.

C. *The Standing Requirement: The Appellees' Case*

As the Supreme Court indicated in *Warth*, "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." 422 U.S. at 500; *see also South E. Lake View Neighbors*, 685 F.2d at 1034. However, the application of the principles governing the law of standing is hardly "a mechanical exercise." *Allen*, 468 U.S. at 751. It is often "appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast*, 392 U.S. at 102; *see also Warth*, 422 U.S. at 500 ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted."). Given the novelty of the case, this is no easy task. Although several other cases have considered aspects of the patronage system, none have focused solely on the impact of patronage hiring policies on candidates and voters. *See, e.g., Branti v. Finkel*, 445

U.S. 507 (1980) (discussing politically-motivated firing); *Elrod v. Burns*, 427 U.S. 347 (1976) (discussing politically-motivated firing); *Avery v. Jennings*, 786 F.2d 233 (6th Cir.) (analyzing the impact of patronage hiring practices on prospective employees), *cert. denied*, 106 S. Ct. 3276 (1986); *McCormick v. Edwards*, 646 F.2d 173 (5th Cir. Unit A 1981) (discussing firing resulting from political activity), *cert. denied*, 454 U.S. 1165 (1982); *Illinois State Employees Union v. Lewis*, 473 F.2d F.d 561 (7th Cir. 1972) (discussing politically-motivated firing), *cert. denied*, 410 U.S. 928 (1973); *Rutan v. Republican Party of Illinois*, No. 85-2369 (N.D. Ill. July 11, 1986), *appeal filed*, No. 86-2073 (7th Cir. argued Apr. 7, 1987) (primarily discussing the impact of politically-motivated hiring practices on employees).

In a thoughtful opinion, the district court, operating without very much guidance from the earlier opinion of this court,[9] suggested that three separate constitutional interests were infringed by the defendants' hiring policy: first, "the plaintiff candidates' rights of free political belief and expression," 481 F. Supp. at 1333; second, the plaintiff voters and candidates' right to associate, *id.* at 1333-34; and third, the plaintiff candidates and voters' right to equal participation in the electoral process, *id.* at 1334-35. In our view, however, the heart of the plaintiffs' case is their contention that the hiring practices of the defendants violate the speech and associational rights of candidates and voters.[10] As a general proposition, the rights of candidates

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[9] *See supra* note 7.

[10] In the view of the district court, the appellees' case has an independent equal protection dimension because the hiring policy of the defendants constitutes a "debasement or dilution of the weight of a citizen's vote" similar to that prohibited by the reapportionment cases. *Shakman*, 481 F. Supp. at 1334 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). The situation

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and voters to communicate freely is beyond question. It is also "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). It is also well-established that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). However, the recitation of these broad principles–as important as they are–does not provide us with sufficient guidance to resolve the issue of standing before us. A far more focused inquiry is required to determine whether the asserted injury is fairly traceable to the defendants' activity. We must more precisely "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff[s] seek[ ] to vindicate." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

At the outset, it is important to note that the hiring practice at issue here is significantly different from the sort of activity that usually forms the basis of a challenge to an electoral system. Indeed, this case is not really a challenge to the mechanics of an electoral system at all. We are not asked to evaluate any aspect of the electoral process–the procedure to get on the ballot or to obtain a place on the

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10 *(Continued)*
presented here is hardly the usual situation in which such a "dilution" claim is made. There has been no restructuring of electoral districts, no restrictions on a candidate's opportunity to appear on the ballot, or no attempt to place one candidate in a particularly advantageous place on the ballot. In our view, the plaintiffs' contention is tied to the merits of their speech and associational rights claims.

ballot. There is no claim that any candidate was deprived of the opportunity to run for office, to appear on the ballot, or to be given any particular place on the ballot. Nor is there any claim that a voter was deprived of the opportunity to vote for a particular candidate. Rather, the gravamen of the appellees' complaint is that the announced hiring practice of the appellant provided a decided advantage in communicating with the electorate and in effectively marshalling community support for the appellants' political cause.

This is not, of course, a claim that the speech and associational rights of the appellees are completely restricted. Rather, it is a claim that the hiring practice had the purpose and effect of giving the appellants a significant advantage in the process of communicating with the electorate. There can be no doubt that unequal treatment of speech by government officials can amount to content regulation of that speech–regardless of whether the government has acted to impede affirmatively the speech of a particular speaker or to assist artificially the speech of another. *See generally Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). Here, government officials have not undertaken either of these roles in any direct manner. Rather, the appellees argue that the incumbents, by maintaining the practice of filling certain government positions with those who have supported them in the electoral process, have indirectly created such an inequality in the treatment of communication. Such a claim of an indirect injury must be scrutinized carefully.

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. *E.g., Roe v. Wade*, 410 U.S. 113, 124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish

> that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Warth, 422 U.S. at 505.

D. *The Standing Requirement: The Appellees' Case and Causality*

The Supreme Court of the United States has stressed that the "links in the chain of causation between the challenged Government conduct and the asserted injury," *Allen*, 468 U.S. at 759, are especially weak when the causal connection depends on many independent decisions of third parties. In *Simon*, the Court held that standing to challenge a government grant of tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospital's policy concerning the provision of medical services to indigents. In that case, noted the Court, the causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status. 426 U.S. at 40-43. Those decisions–made by many independent institutions for reasons tailored to the circumstances of the individual institution–were "sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action." *Allen*, 468 U.S. at 759. "Speculative inferences," *Simon*, 246 U.S. at 45, were necessary to connect the injury to the challenged action. Similarly, in *Allen*, the court found that there was insufficient causation in the claim of parents that their children's opportunity for a racially integrated public education was diminished by the federal tax exemptions granted to some racially discriminatory private schools which "accommodate white students avoiding attendance in desegregating public school districts." *Allen*, 468 U.S. at 746. Such a theory of causation:

> involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending

> such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

Id. at 759.

In this case, we find the line of causation between the appellants' activity and the appellees' asserted injury to be particularly attenuated. As in the foregoing cases, the line of causation depends upon countless individual decisions. Moreover, those countless individual decisions must depend upon, according to the appellees' own theory of the case, countless individual political assessments that those who are in power will stay in power. It is not the hiring policy itself which creates any advantage for the incumbents. Any other candidate is entirely free to assert that, if elected, he will follow the same policy. Any advantage obtained by the incumbent is obtained only if potential workers make an independent evaluation that the incumbent, and not the opposition, will win. The plaintiffs will be at a disadvantage if–and only if–a significant number of individuals seeking political job opportunities determines the "ins" will remain the "ins."

Here, the appellants admit that one of the purposes of the patronage hiring policy was to "help[ ] elect candidates supported by the various members of the Democratic County Central Committee." R.89 at 4. This admission simply states the obvious that some of the hundreds of office seekers in Cook County will undoubtedly decide that the incumbents are likely to remain the incumbents and, for that reason alone, will work for the incumbents during the campaign. Others–no one knows how many–while interested in a political job will consider such a factor as simply one of many motivating their decision to be politically active. For others, it may not be a factor in the decision to be politically active but may influence the character or intensity of their contribution. However, others who

desire to obtain a political job may read the political signs quite differently and decide, either as a matter of principle or expediency, that they ought to commit their energy to the political efforts of non-incumbents.

For each citizen, many factors, many not capable of articulation, will determine the nature and extent of that person's political activity. For those recruiting such political workers, political incumbency has advantages and disadvantages. In some political environments, a patronage hiring policy by the incumbents may enjoy a good deal of credibility with potential workers. Not only may the incumbents be able to point to a successful political track record, but they may also be able to demonstrate their determination to implement such a policy by their present actions. Moreover, in many instances, although not always, the incumbent enjoys certain natural advantages in communicating with the citizenry. However, in other political environments, incumbency may well be a ball and chain on the leg of the candidate and the announcement of such a patronage policy may, far from being an advantage, seal his political doom. Indeed, it may be the challenger who can attract workers with the promise that, once elected, he will continue to seek the help of those who have supported him. We do not believe, therefore, that the plaintiffs can assert, with the certainty required by the case-and-controversy requirement, that the injury they assert is "fairly traceable" to the actions of the defendants that form the basis of their complaint.

In reaching this conclusion, we have found instructive the thoughtful discussion of our colleagues on the District of Columbia Circuit in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).[11] There,

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[11] While the *Winpisinger* court found it unnecessary to repudiate directly this circuit's holding in *Shakman I*, also made it clear that it had serious reservations as to its correctness. *Winpisinger*

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the court was faced with a claim of injury allegedly caused by the abuse of the power of incumbency. In that case, the plaintiffs, supporters of Senator Edward M. Kennedy in his quest for the presidential nomination of the Democratic Party, claimed that the abuse of the power of incumbency by members of President Carter's administration, including the power to hire federal employees on the basis of political affiliation, *id.* at 136, injured "plaintiffs' constitutional rights under the First and Fifth Amendments, as voters, contributors and participants in the process of Presidential nomination," *id.* at 135. The court, relying on both constitutional and prudential considerations, held that the plaintiffs lacked standing. With respect to constitutional concerns, the court determined that the plaintiffs had failed to demonstrate the requisite causal connection between the actions of the defendants and their alleged injury:

> In the case before us, whether an appellant is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to appellees.

Id. at 139.

There are, of course, factual differences between this case and *Winpisinger*. As the *Winpisinger* court indicated (albeit in its discussion of prudential rather than constitutional concerns), this case deals with a single activity–political hiring–rather than a wide-range of actions by the

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11 *(Continued)*

v. Watson, 628 F.2d 133, 141 & n.32 (D.C. Cir.), *cert. denied*, 446 U.S. 292 (1980). While according this circuit's opinion "due respect," *id.* at 141, it also noted that *Shakman I* was decided prior to the Supreme Court's reassessment of the standing requirement. *Id.* at 141 n.32

incumbents. It also involves a single county, not a coordinate branch of the federal government. *Id.* at 141. But these differences, whatever their relevance with respect to prudential concerns,[12] have little pertinence when assessing whether the plaintiffs have demonstrated the requisite causality between their alleged injury and the actions of a political incumbent. It is no easier to measure the effect of an incumbent's promises on the ebb and flow of the political tide in Cook County, Illinois than it is in any other political context.[13]

A plaintiff cannot assert injury to his viability as a candidate or his influence as a voter simply on the basis of the advantage–real or imagined–of incumbency. Such a course would require that we resolve "profound questions of political science that exceed judicial competence to answer. . . ." *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).[14] Tracing

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[12] The District of Columbia Circuit, in addressing the prudential concerns, relied heavily on the political question doctrine. *See Baker v. Carr*, 369 U.S. 186 (1962). That aspect of justiciability concerns the relationship between the judiciary and the coordinate branches of the federal government. *See Elrod v. Burns*, 427 U.S. 347, 351 (1976) (plurality); *Baker*, 369 U.S. at 210.

[13] The *Winpisinger* court also assumed that *Shakman I* involved "a system of coercing political activity through the threat of arbitrary dismissal for failure to participate." 628 F.2d at 141. In its present posture, the case involves a far more amorphous complaint–political hiring *without* the companion practice of political firings.

[14] Our holding today is limited, or course, to the situation before us. We do *not* address the question of whether candidates and voters would have standing to attack coerced political work demanded of those already employed by the government as a condition of continued employment. The Supreme Court has made it clear that the discharged employees have standing to bring such an action. *See Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns* 427 U.S. 347 (1976).

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the appellees' asserted injury to the appellants' activity, *see Simon*, 426 U.S. at 41-42, must depend on more than the attempt of a federal court to take the political temperature of the body politic.

Finally, a word of caution is necessary. Our holding today deals only with the plaintiffs' standing to attack the constitutionality of the defendants' hiring practices. Our holding does *not* address the substantially different question of whether the plaintiffs would have standing to attack the constitutionality of the coerced political work demanded of those already employed by the government as a condition of continued employment. This latter question obviously raises substantially different considerations. Therefore, we explicitly note that nothing in our holding today can be construed as affecting the continued validity of the *Shakman* decree.

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14 *(Continued)*

Of course, we are not confronted with the question of whether those seeking employment could maintain an action against the defendants. This case does not involve plaintiffs in that situation.

Conclusion

Because we have determined that the plaintiffs do not have standing to assert the claim they bring to this court, we can proceed no further. Accordingly, the judgment of the district court is vacated and the case is remanded to the district court. Those aspects of complaint which challenge the patronage hiring practice of the defendants are dismissed. The district court shall, in all other respects, retain jurisdicition.[15]

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[15] That appeal involves only the plaintiffs' allegations that the defendants' hiring practice, standing alone, was unconstitutional. Those portions of the complaint addressing this contention must now be dismissed. This appeal did not involve the plaintiffs' contention that politically-motivated discharges by the defendants are unconstitutional. That issue was the subject of a consent decree with respect to many of the defendants, R.42, and of the court's unappealed judgment with respect to other defendants. *See supra* note 3. The district court continues to exercise jurisdiction to enforce its judgment with respect to those claims.

Michael L. SHAKMAN and Paul M. Lurie, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

The DEMOCRATIC ORGANIZATION OF COOK COUNTY, a corporation, et al., Defendants.

No. 69 C 2145

United States District Court,
N. D. Illinois, E.D.
Nov. 6, 1969

MEMORANDUM OPINION

MAROVITZ, District Judge.

Plaintiffs' Preliminary Motions

Defendants' Motion to Dismiss

This is a class action which alleges deprivations of freedoms of speech and association as well as due process and equal protection to the law in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and of certain civil rights statutes, 42 U.S.C. §§ 1983, 1985, 1986, 1988, arising from an alleged political patronage system. Plaintiff Shakman is an independent (not endorsed by any political party) candidate for Delegate to the Illinois Constitutional Convention. Plaintiff Lurie is one of his supporters. Defendants are Democratic party organizations and various officials of those organizations, the City of Chicago, and various officials of the City and of Cook County, Illinois.

In this six count complaint, Counts I and IV are brought by Shakman as a candidate for public office, Counts II and V are brought by both plaintiffs as voters, and Counts III and VI are brought by both plaintiffs as taxpayers. Counts IV, V, and VI differ from Counts I, II, and

III respectively in alleging conspiracy to commit the acts complained of in the lower numbered counts. The various counts are also brought on behalf of all others similarly situated. Plaintiffs seek declaratory and injunctive relief plus compensatory and exemplary damages.

All defendants have filed multifaceted motions to dismiss this complaint. Some of the reasons set forth by defendants are without merit. Plaintiffs have not inexcusably delayed instituting this action and are not barred by laches. *Loverich v. Warner Co.*, 118 F.2d 690, 693 (3d Cir. 1941). Similarly, the complaint cannot be dismissed because the motion for preliminary injunction was not accompanied by a bond. Under the federal rules, security is not required unless and until the equitable relief is to be granted. Rule 65(c), F. R. Civ.P.; 7 Moore's Federal Practice Ch. 65, ¶ 65.09, at 1656 (1968).

A considerably more serious issue is raised by defendants when they suggest that the subject matter of this action involves a political question which, therefore, renders the lawsuit non-justiciable. The non-justiciability of political questions is a doctrine which extends back to *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 164-166 (1803). Further, there can be no doubt that this complaint involves political matters. Plaintiffs have alleged that defendants control and exert coercion over patronage employees, who are defined as those persons employed by Chicago and Cook County governmental entities, hired on the basis of political support and not protected by civil service or otherwise against arbitrary discharge from employment. The complaint further alleges that these employees are required to take time off from their jobs in order to perform political work, for which they are paid with public funds. As a result of this alleged misuse of public funds and personnel, the rights of the Democratic patronage employees are allegedly infringed in that they may not associate with plaintiff candidate, speak on his behalf, vote freely, or

refuse to support defendant political organizations. Further alleged unlawful results of the patronage system are that plaintiff candidate is deprived of the right to associate with these employees, that plaintiff cannot express himself through patronage employees, that plaintiff's supporters cannot have their votes cast effectively, that the votes of plaintiff and his supporters are debased, that the election in which plaintiff is running will not be determined by votes freely cast, that plaintiff is forced to support political organizations, policies, programs, and candidates to which he is opposed, and that the electoral process is not rudimentarily fair or free of substantial political interference. Complaint, ¶ 38.

That these allegations are obviously politically oriented does not automatically resolve the motion to dismiss for if the political question doctrine is of long duration, it is also of increasingly limited scope. In recent years, the doctrine has been considerably narrowed. Thus the judiciary has considered politically tainted issues of reapportionment, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), petitioning for a place on a ballot, *e.g.*, *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1969), ballot position, *e.g.*, *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969), and discrimination in party primaries, *e.g.*, *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). At the same time, courts have maintained a reluctance to interfere with the strictly internal operations of a political party. *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119, 120 (8th Cir. 1968); *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965).

A determination as to the justiciability of the political issues in this case in the light of the standards set forth in

Baker v. Carr, 369 U.S. 186, 209, 217, 226, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), need not be made, however, because plaintiffs lack the requisite standing to litigate this controversy. Assuming for the moment that plaintiff's complaint is well pleaded, which assumption is questionable in view of the vague conclusory allegations, and further accepting for the purposes of this motion similar allegations that thousands of patronage employees are being coerced into making involuntary contributions of time and money and that they are being deprived of their right to associate with, work for, contribute money to and vote for plaintiff candidate, (Complaint, ¶ 39) the proper parties to assert that those deprivations amount to unlawful violations of their civil rights are the patronage employees, not plaintiff. *Cf. Tileston v. Ullman*, 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943). Plaintiff has asserted that "these employees are not free to assert themselves since they believe that to do so will lead to the loss of their patronage jobs or other punishment in said jobs." Complaint, ¶ 39. Nevertheless, the issues presented are of such a serious nature and have a potential impact across the country in local, state, and national affairs, that we cannot allow self-appointed representatives of other persons federal rights, no matter how decent their intentions, to attempt to remedy the alleged wrongdoing. If the patronage system does concern upwards of 30,000 persons (Complaint, ¶ 27), has existed for "many years," (*Id.*) and is as coercive and obnoxious as is claimed, there should be some patronage employees willing and able to assert their rights for themselves and their class. Any other rule would risk improper representation and prosecution of the claims of these employees to say nothing of creating raising questions concerning the binding nature of a decision affecting persons not before the court. The rule prohibiting reliance on another's constitutional rights is admittedly a rule of self-restraint which may be disregarded in unique situations where, for instance, the action of a state court might result in a denial of constitutional rights to the absent party, *Barrows v. Jackson*, 346 U.S.

249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). In the instant case, we know of no similar impediment to the attempted enforcement of an aggrieved party's civil rights.

Of course, unlike the *Tileston* case, plaintiffs have alleged deprivations of their own rights. Compare, *Tileston v. Ullman*, 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943). Yet, these asserted rights are not infringed directly, but derivatively, i.e., because rights of the patronage employees are allegedly infringed. Thus, Candidate Shakman alleges he is deprived of his freedom of speech and association because certain patronage employees are unlawfully deterred from associating with or speaking or working for him. Recognizing that standing "has been, and remains, one of the most enigmatic areas of the law," *Investment Company Institute v. Camp*, 274 F.Supp. 624, 632 (D.D.C.1967), we think that plaintiff is the wrong party to complain about alleged wrongs incurred by patronage workers.

Leaving aside the issue of standing to litigate, plaintiffs' complaint is subject to dismissal because it is conclusory. For purpose of testing the sufficiency of a complaint under Rule 12(b)(6), "the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A Moore's Federal Practice Ch. 12, ¶ 12.08 at 2266-2269 (1968). In the complaint, plaintiff contends that he is deprived of the "right to associate" with certain patronage employees, yet he has never alleged that he attempted to associate with any such employee and was spurned. Similarly, plaintiff contends that he is deprived of the "right to express and espouse" his candidacy through patronage employees. Even assuming the First Amendment guarantees the right to speak through other persons' mouths, there has been no allegation that plaintiff has attempted to engage patronage employees to speak for him. Plaintiff's allegation that he is being deprived of the "right to cast his

vote effectively and to have the election determined on the basis of votes so cast" is another unwarranted deduction. Plaintiff has not alleged that he or any of his supporters who are qualified to vote have been or are being denied access to the polls. Nor has plaintiff alleged that the tally of votes cast in Constitutional Convention elections is not an accurate count of the votes made by qualified voters. In a like fashion, plaintiff has also alleged that votes of himself and his supporters are "dilute(d) and debase(d)." This conclusion is unwarranted for a number of reasons: there has been no allegation that patronage employees in plaintiff's district are not entitled to vote, there is no way of precisely knowing which voter votes for which candidate, and plaintiff candidate in fact received enough votes to qualify as a candidate for the office he seeks. Similarly, the conclusion is unwarranted that votes cast in the two Constitutional Convention elections are not "freely cast." Again, no one can say for sure which voter voted for which candidate. See generally, Complaint, ¶ 38.

In addition, plaintiff has alleged that he and his supporters have been deprived of a fair electoral process free of "substantial partisan interference." Neither the federal constitution nor any civil rights law prohibits legitimate activity including canvassing, poster hanging and poll watching (Complaint, ¶ 38) by partisan political personnel in an election. The patronage employees about whom plaintiff is so concerned have as much right to support the candidate of their choice as do plaintiff's supporters. No doubt plaintiff will respond in agreement, but contend that the employees are coerced. If so, then as stated earlier, it is not for plaintiff to assert the rights of others, rather it is the patronage employees' right to bring an action on their own behalf.

Plaintiff has further contended that he is "force(d) * * * to support and contribute" to a political organization to which he is opposed. In all of plaintiff's lengthy complaint,

we can find no factual allegations regarding coercion as to him. The funds allegedly used by plaintiff's opponents are allegedly derived from coerced contributions from patronage employees. Complaint, ¶ ¶ 29, 30, 35. As plaintiff has not alleged himself to be one of these coerced contributors of time and money, the conclusion that he is forced to support policies and personnel undesirable to him is simply not justified. To the extent plaintiff complains that taxpaying is a compelled involuntary contribution to defendants and their policies, the complaint fails to state a cause of action. Payment of taxes cannot be refused because of disagreement with governmental policies, whether they include school busing, law enforcement or anything else. The mere fact that some individual defendants are not only government officials, but also political leaders does not alter the propriety of paying properly assessed taxes.

Finally, plaintiff also alleges that the acts of the defendants constitute "gross and invidious discrimination" against plaintiff as a candidate and voter. However, the relationship between the acts alleged and the result alleged is not apparent. Plaintiff is not entitled to the support of any or all political parties or their supporters. To allege that they deny him aid or oppose him may indicate a lot of things, but one of them is not unlawful discrimination.

In conclusion, viewed charitably, the complaint makes several serious charges regarding the direct deprivation of rights of a class of persons characterized as Democratic patronage employees. Whether or not the complaint can be said to state a cause of action on their behalf need not be considered presently, because those employees are not before this court. Further, given the gravity of the charges and the absence of any allegation that plaintiff fairly represents the class of allegedly aggrieved employees, we find that plaintiff does not have standing to assert the alleged violations of the rights of said employees as set forth in the Complaint, ¶ 39.

Nor do we think the complaint can be saved because plaintiff has alleged that the harm done to the patronage employees also harms him. The violations charged in the Complaint, ¶ 38 are too conclusory to support a cause of action upon which relief may be granted. Plaintiff has simply not alleged facts sufficient to warrant the deductions and charges of alleged deprivation of rights as to him and his supporters.

Plaintiffs' motion for injunctive relief is denied. Defendants' motion to dismiss is granted.

In The

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 JANUARY SESSION, 1970

No. 18043

MICHAEL L. SHAKMAN and PAUL M. LURIE,

Plaintiffs-Appellants,

v.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 23, 1970

Before SWYGERT, *Chief Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This action challenges the use of patronage in the city of Chicago and Cook County in a manner which allegedly puts at an electoral disadvantage those who desire the election of candidates in opposition to those in power. In briefest outline, plaintiffs allege that officers of the city and county require city and county employees, as a condition of holding their jobs and drawing their salaries from the public treasuries, to furnish votes, campaign work, and money to elect candidates chosen by

the regular democratic organization, and that this practice makes more difficult and often prevents the election of other candidates.

The district court dismissed the complaint and plaintiffs appealed.

The two plaintiffs allege that they are residents, voters, and taxpayers within the 24th state senatorial district, within the city of Chicago and Cook County. Plaintiff Shakman was a candidate, not endorsed by any party, at the election held November 18, 1969 for delegates to the Illinois constitutional convention. Plaintiff Lurie supported Shakman. This action was commenced about a month before the election. Although the particular election is over, the practices challenged are allegedly of a continuing nature, and the case is not moot.[1]

Plaintiffs set out six counts, so as separately to seek redress for deprivation of constitutional rights on behalf of (1) Shakman, and all other independent candidates, including those at future elections, as candidates; (2) both plaintiffs, and all others similarly situated, as voters; (3) both plaintiffs, and all others similarly situated, as taxpayers; and separately to predicate each such claim upon an averment of conspiracy to effect such deprivation.

The defendants include the mayor and treasurer of the city, the president of the board of county commissioners, the county assessor, the county clerk, and the clerk of circuit court. There has been no argument that these defendants are not acting under color of law in making the appointments which allegedly implement the patronage system under attack. The democratic county central committee, which is a statutory party organ, several of its members, several aldermen and county commissioners, and a not for profit corporation known as The Democratic

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[1] *Cf. Moore v. Ogilvie* (1969), 394 U.S. 814, 816.

Organization of Cook County are additional defendants. It is alleged that all conspired to deprive plaintiffs of rights.

Jurisdiction is claimed under 28 U.S.C. § 1331, of a controversy arising under the constitution, and a jurisdictional amount is alleged. Jurisdiction is also claimed under 28 U.S.C. § 1343(3) of an action to redress the deprivation under color of state law, of rights secured by the constitution. Assuming justiciability, the existence of jurisdiction, at least under § 1343(3), is clear.[2]

The complaint defines a democratic patronage employee (DPE) as a person employed by the city or county on the basis of his political support of the county democratic organization, of which the mayor is president. It is alleged that there are between 8,000 and 30,000 DPEs; that many are hired on a basis where one's employment must be renewed each several months if it is to continue; that most DPEs are required, as a condition of keeping their jobs, or in order to escape discipline, to contribute money to the county democratic organization, or its affiliates, or endorse candidates, and to do political work for such organizations and candidates. Some of such allegedly coerced work is done during regular working hours and some on the DPE's own time. The defendants, it is alleged, coerce DPEs by this means to give votes, political support, campaign work, and money to candidates endorsed by the organization and its affiliates.

Plaintiffs ask, among other things, for a declaration that the practices of defendants violate constitutional and other federal rights of candidates, voters, and taxpayers of Chicago, an injunction against those practices, and damages.

One of the reasons given by the district court for dis-

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[2] See *Bell v. Hood* (1946), 327 U.S. 678; *Baker v. Carr* (1962), 369 U.S. 186, 198.

missing the complaint is that plaintiffs lack standing to seek redress for the injury to the rights of the DPEs resulting from the alleged coercion. Plaintiffs point out that there are decisions permitting vicarious vindication of constitutional rights for reasons of policy.[3] But here, in any event, plaintiffs are seeking redress for injuries to their own interests and the interests of others similarly situated. Assuming the truth of plaintiffs' averments, and assuming that interests of theirs which are allegedly injured are rights, privileges, or immunities secured by the federal constitution, their standing to bring a § 1983 or § 1985 action is apparent.[4]

Plaintiffs also aver that they are taxpayers, challenging the misuse of tax funds in that DPEs are allegedly required, as a condition of continuing to receive their compensation out of public money, to vote for and assist candidates selected by defendants and opposed by plaintiffs. Plaintiffs are asserting that the practice causes injury to their [3]interests as candidates and voters, and if those interests are constitutionally protected from the type of injury alleged, it will be unnecessary to decide whether their taxpayer interest alone would give them standing.[5]

The other reason given by the district court for dismissing the complaint is that it is conclusory. The court pointed to a number of assertions in the portion of the complaint where the pleader attempted to describe the impact of the practice complained of on plaintiffs' right of association, right to express one's self as a candidate, right to vote effectively, and the like. The district court did not agree, and we do not, with much of

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[3] See examples cited in *Smith v. Board of Education of Morrilton Sch. Dist. No. 32* (8th Cir., 1966), 365 F.2d 770, 776.

[4] *Baker v. Carr* (1962), 369 U.S. 186, 204.

[5] See *Doremus v. Board of Education* (1952), 342 U.S. 429, 434.

plaintiffs' expression of the legal analysis of such impact. Most § 1983 complaints contain material in this area, and we agree that a pleader's abstract assertion that one or another constitutional right has been violated do not require the court to decide that a claim has been adequately stated.

But the averments concerning the operation of the patronage system and the disadvantage it causes to candidates and voters who attempt to use the election process to change the direction of government are factual and give adequate fair notice of the claim asserted.[6]

We consider the significant questions, unanswered to this point, to be whether these disadvantages to the interests of candidates and voters amount to deprivation of any rights, privileges, or immunities secured by the constitution, and whether for any reason this area of controversy must be deemed nonjusticiable.

It is clear that at least some aspect of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.

The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection.[7] "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." [8]

The equal protection clause secures from invidious official discrimination the voter's interest in a voice

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[6] See 2A Moore, Federal Practice ¶ 8.13, pp. 1695-1700.

[7] *Snowden v. Hughes* (1944), 321 U.S. 1. See *Weisberg v. Powell* (7th Cir., 1969), 417 F.2d 388, 392.

[8] 321 U.S. 11.

in government of equal effectiveness with other voters.[9]

We acknowledge that the decisions just referred to involved mechanical aspects of the election process: *e.g.*, the right to cast a vote, a candidate's place on the ballot, and equal size in districts entitled to a representative. The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

We see no ground upon which to decide that the controversy suggested by plaintiffs' claims is nonjusticiable.

> "In the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." [10]
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> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

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[9] *Baker v. Carr* (1962), 369 U.S. 186; *Gray v. Sanders* (1963), 372 U.S. 368; *Reynolds v. Sims* (1964), 377 U.S. 533, 565; *Carrington v. Rash* (1965), 380 U.S. 89; *Williams v. Rhodes* (1968), 393 U.S. 23; *Avery v. Midland County* (1968), 390 U.S. 474; *Moore v. Ogilvie* (1969), 394 U.S. 814; *Hadley v. Junior College District* (1970), 397 U.S. 50.

[10] *Baker v. Carr* (1962), 369 U.S. 186, 198.

> discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." [11]

One may foresee that in the areas of proof, and devising relief if the claims be proved, care will be required in order to distinguish between compelled and voluntary political support by public employees. Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression, on their own time, as anyone else.

We do not view possible difficulties of the sort just mentioned as demonstrating "a lack of judicially discoverable and manageable standards for resolving" the case or as requiring, at the pleading stage, a decision that plaintiffs' claim is not justiciable.

Defendants rely upon the eighth circuit decision in *Irish v. Democratic Farmer-Labor Party of Minnesota.*[12] There the court held that there was nothing of constitutional significance in an alleged malapportionment of representation in the state convention of a political party. The court went on to say that the case presented a nonjusticiable political question. We think that the nature of the problem there, with respect to the internal operations of a political party, is sufficiently different from the

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[11] Ibid. p. 217.

[12] (8th Cir., 1968), 399 F.2d 119.

problem presented in the complaint before us, that *Irish* offers no guidance here. Because of the difference, it is unnecessary to decide whether we agree with the reasoning of *Irish*.

We note the argument, made by several defendants that the complaint is fatally defective for failure to join as defendant the Republican Party. We find no merit in the proposition.

Plaintiffs have asked that in addition to reversing the order of dismissal we direct the district court to grant a preliminary injunction. We deem it inappropriate, however, at this time, to preempt the district court's discretion with respect to a preliminary injunction.

The judgment is reversed and the cause remanded for further proceedings.

SWYGERT, *Chief Judge*, dissenting.

I would sustain the district court's dismissal of the complaint, but on a ground different from those assigned by the district judge. In my opinion this case presents a nonjusticiable controversy in the sense that it involves a "political question"—one that should be dealt with by the state legislature and not by the courts.

A distinction should be drawn in this area between the rights of voters and candidates for public office to be given equal treatment by the state in the "mechanical aspects of the election process," to use Judge Fairchild's apt phrase, and remedies for alleged abuses of the persuasion or electioneering aspects of the process. For example, in *Baker v. Carr*, 369 U.S. 186 (1962), it was held that the citizens of a state suffer a "debasement of their votes" and thereby a denial of equal protection of the laws when the state legislature refuses or fails to allocate its legislative representation on an equal basis among the voters of the state. In *Moore v. Ogilvie*, 394 U.S. 814 (1968), the Supreme Court

held that a state may not discriminate against the residents of the more populous sections of a state in favor of the less populous by requiring a rigid, arbitrary number of signatures from each county on petitions for independent candidates for political office. In *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969), this court had before it a case concerning an arbitrary and discriminatory procedure adopted by the Illinois Electoral Board in the placement on the ballot of candidates to a state constitutional convention. All three cases, which are illustrative of the decisions in this area, dealt with procedures enacted by state legislatures relating to the democratic elective process directed to attain representative government.

In the instant case we are not asked to apply the equal protection test to a legislative enactment governing the elective process or even to a deviation from such an enactment by those statutorily charged to carry out its mandate. Rather, we are asked to go one step further and hold that the conduct of a public official is constitutionally proscribed when he allegedly requires employees whom he appoints and can summarily discharge to contribute money and "public" time to the candidacy of those favored by him.

In *Baker v. Carr*, the Supreme Court recognized that there may be areas of activity relating to the elective process that are not justiciable because of the "inappropriateness of the subject matter for judicial consideration." The court then set forth the applicable test: "In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." 369 U.S. at 198. When this test is applied to the claims made by plaintiffs, its apparent that the instant case should be classified as nonjusticiable. Assuming proof of the claims, it is not difficult

to contemplate the problems facing the district court in molding a proper remedy and, perhaps more important, with its enforcement.

I agree with the observation made by defendants that the relief requested is tantamount to asking the court to enlarge the Federal Hatch Act, 5 U.S.C. §§ 7321 *et seq.*, to encompass the political activity of local government employees. Whether coverage should be extended to such employees as a matter of public policy is not the question. The question is whether a federal court should attempt to formulate "judicially discoverable and manageable standards,"[1] relating to such activity and whether it should be called on to mold a piecemeal remedy by injunctive decree.

In my judgment this case presents issues of which the courts should not take cognizance. It is a matter that should be left to the legislature.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,

Plaintiffs,

vs.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY; DEMOCRATIC COUNTY CENTRAL COMMITTEE OF COOK COUNTY and all its members; GEORGE W. DUNNE, individually and as President of the Board of County Commissioners of Cook County, as President of the Board of Commissioners of the Forest Preserve District of Cook County, and as Chairman of the Democratic County Central Committee of Cook County; CITY OF CHICAGO, a municipal corporation; JANE R. BYRNE, Mayor of the City of Chicago; MORGAN M. FINLEY, individually and as Clerk of the Circuit Court of Cook County; EDWARD J. ROSEWELL, individually and as Treasurer of Cook County; STANLEY J. KUSPER, JR., individually and as Clerk of Cook County; THOMAS C. HYNES, individually and as Assessor of Cook County, FOREST PRESERVE DISTRICT OF COOK COUNTY, a municipal corporation; RICHARD J. ELROD, individually and as Sheriff of Cook County; The CHICAGO PARK DISTRICT, a municipal corporation, et al.,

Defendants.

No. 69 C 2145

Before Honorable
Nicholas J. Bua, Judge
United States District Court

September 24, 1979

OPINION

This is a class action brought under the first amendment, the equal protection clause of the fourteenth amendment, and 42 U.S.C. §§1983 and 1985, challenging the patronage practices of the regular Democratic and Repub-

lican Party organizations in most of the Northern District of Illinois. Plaintiffs are independent candidates, voters, and taxpayers. The defendants include various government officers at the state and local levels, local government entities, and local organizations and officials of the two major political parties. Plaintiffs' principal theory is that the use of state and local government patronage power to coerce political support for the regular Party organizations and their candidates violates independents' rights to fair and equal participation in the electoral process. By way of redress, plaintiffs seek declaratory and injunctive relief.

This case has a long history in this court. A 1969 dismissal of this action by Judge Marovitz was reversed by the Seventh Circuit in 1970. Following that reversal, plaintiffs entered into a consent decree with many of the Democratic and Republican defendants. The consent decree resolved most of the issues as to those defendants. Stipulations of fact were then filed as to (1) the remaining issues between plaintiffs and the Democratic defendants who are parties to the consent decree, and (2) all issues between plaintiffs and the Democratic defendants who are not parties to the consent decree. These matters are now before the court on crossmotions for summary judgment.

I. INTRODUCTION

Plaintiff Shakman is a resident of the City of Chicago and the County of Cook. Running in his home district, Shakman was an independent candidate in the November, 1969, election for delegates to the 1970 Illinois Constitutional Convention. At the time of that election, plaintiff Lurie was a resident of the same district. Lurie was one of those voters who supported Shakman's candidacy. In October, 1969, the plaintiffs filed the original complaint in this action, attacking the patronage practices of the regular Democratic Party organization in Chicago and Cook County. Those named as defendants included the City and its Mayor, various County officers, the Democratic County

Central Committee, and the Democratic Organization of Cook County.

The primary factual allegations of the original complaint may be summarized as follows. The regular Democratic Party organization has long enjoyed a position of strong dominance in Chicago and in Cook County as a whole. This position has allegedly given the Democratic County Central Committee and the Democratic Organization of Cook County a great deal of control over the various offices, departments, and agencies of the City, the County, and many of the suburban political entities located within the County. These government offices, departments, and agencies employ thousands of persons who are not selected on a merit basis and are not protected by statute from arbitrary discharge. Many are even employed on "temporary" terms which require that their employment be renewed every several months. At the time the complaint was filed, most of these non-protected employees were required, in order to obtain their government jobs, and in order to keep those jobs or to avoid some form of job-related discipline, to have the "sponsorship" of some appropriate individual connected with the Democratic Party organization. These employees are referred to as "patronage employees." In order to secure and maintain the necessary sponsorship, patronage employees were allegedly required to contribute or promise to contribute and to do or promise to do political work for the Democratic organization and/or its candidates. According to the complaint, patronage employees were often required to do involuntary political work on public time, or to take time off their government jobs to do such work.

Thus, using governmental power and, directly or indirectly, public funds, the defendants allegedly control by coercion the political behavior of patronage employees. This enables the defendants to generate a massive political effort in favor of their organization and its candidates.

The end result, plaintiffs claim, is a substantial electoral advantage for regular Democratic Party candidates, with a corresponding disadvantage to opposing candidates and voters.

Defendants' patronage practices were alleged to infringe, *inter alia*, (1) the rights of plaintiff Shakman, as an independent candidate, to associate with actual and potential supporters and to be free from invidious discrimination, (2) the rights of both plaintiffs, as independent voters, to associate and to cast their votes effectively in an electoral process free from substantial partisan interference, (3) the rights of both plaintiffs, as taxpayers, to be free from coerced political contributions to the Democratic Party organization and its candidates, and (4) the rights of the patronage employees to speak, vote, and associate. In addition to other relief, plaintiffs sought a permanent injunction in effect forbidding the use of any political considerations in employment practices of the government defendants.

The original complaint consisted of six counts. Counts I and IV sought relief on behalf of plaintiff Shakman and all other independent candidates similarly situated, including those in future elections. Counts II and V sought relief on behalf of both plaintiffs and all other independent voters similarly situated. Counts III and VI sought relief on behalf of both plaintiffs and all similarly situated taxpayers. Counts I, II, and III alleged the direct liability of each of the defendants for every wrong of which plaintiffs complained. Counts IV, V, and VI were corresponding counts alleging conspiracy liability.

Shortly after the complaint was filed, all of the defendants moved to dismiss it, raising a variety of arguments. Judge Marovitz granted these motions. *Shakman v. Democratic Organization of Cook Co nty*, 310 F. Supp. 1398 (N.D. Ill. 1969). Judge Marovitz's dismissal was based on the twin grounds that the plaintiffs lacked standing to sue

and that the allegations of the complaint were conclusory. Regarding standing, the court found that plaintiffs as candidates, voters, and taxpayers, could not assert the constitutional rights of patronage employees. 310 F. Supp. at 1401. Turning to the allegations that plaintiffs' own rights had been violated, the court reasoned that any violations of plaintiffs' own rights were merely derivative of the alleged violations of the rights of patronage employees. *Id.* In view of this disposition, the court found it unnecessary to determine whether plaintiffs' claims presented non-justiciable political questions. 310 F. Supp. at 1400.

On appeal from the dismissal, the Seventh Circuit reversed. *Shakman v. Democratic Organization of Cook County,* 435 F. 2d 267 (7th Cir. 1970). While plaintiffs' appeal from Judge Marovitz's order was pending, the November, 1969, delegate election took place. Shakman was defeated by 623 votes. A regular Democrat and an independent were elected delegates in the 24th senatorial district. After observing that these circumstances did not moot the case, the court of appeals examined and rejected the grounds for dismissal relied upon by the district court. As to standing, the court found no need to decide whether plaintiffs could assert the rights of patronage employees, or whether plaintiffs' interests as taxpayers would alone be sufficient to confer standing. Instead, the court simply stated that insofar as plaintiffs sought redress for injuries to their own interests as candidates and voters and the interests of others similarly situated, standing, *per se,* was no obstacle 435 F. 2d at 269.[1] Also, while agreeing that

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[1] It is now clear that the plaintiffs' status as taxpayers would not give them standing in this case. Taxpayers have standing to challenge only those expenditures that violate a constitutional provision which is recognized as a specific limitation upon state power to tax and spend. *United States v. Richardson,* 418 U.S. 166 (1974); *Frisell v. Rizzo,* 597 F.2d 840, 850 (3rd Cir.), *cert.*

(Footnote continued on the following page)

some parts of the complaint were conclusory and reflected questionable legal analysis, the court concluded that "the averments concerning the operation of the patronage system and the disadvantage it causes to candidates and voters who attempt to use the election process to change the direction of government are factual and give adequate fair notice of the claim asserted." 435 F. 2d at 270.

The court then addressed two remaining questions of crucial importance: whether the alleged disadvantages to the interests of independent candidates and voters constituted a deprivation of any right or rights secured by the constitution, and whether the case was for any reason nonjusticiable. In considering the status of plaintiffs' interests, the court referred to a number of Supreme Court decisions dealing with inequalities in election procedures, *e.g.*, *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Snowden v. Hughes*, 321 U.S. 1 (1944). These cases were found to support the proposition that both a candidate's rights to an "equal chance" and a voter's right to an "equally effective voice" are entitled, under the equal protection clause, to protection from invidious official discrimination. The court recognized that in the present case these rights were allegedly impaired in a different manner than in the election procedure cases. Nevertheless, it found those cases to be controlling:

> We acknowledge that the decisions just referred to involved mechanical aspects of the election process: *e.g.*, the right to cast a vote, a candidate's place on the ballot, and equal size districts entitled to a representative. The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power

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1 *(Continued)*

docketed, No. 78-1890, 48 U.S.L.W. 3001 (June 20, 1979). The defendants are therefore entitled to summary judgment on Counts III and VI.

> over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury from inequality in election procedure.

435 F. 2d at 270.

Finally the court rejected the argument that the case was nonjusticiable:

> One may foresee that in the areas of proof, and devising relief if the claims be proved, care will be required in order to distinguish between compelled and voluntary political support by public employees. Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression on their own time, as anyone else.
>
> We do not view possible difficulties of the sort just mentioned as demonstrating a "lack of judicially discoverable and manageable standards for resolving" the case or as requiring, at the pleading stage, a decision that plaintiff's claim is not justiciable.

435 F. 2d at 271.

After the Supreme Court denied certiorari, 402 U.S. 909 (1971), settlement negotiations began. Several months later, all parties agreed, on certain conditions, to the entry of a consent decree. A copy of the proposed decree was tendered to the court in October, 1971. In essence, the decree purported to free those *already hired as government employees* from all coercion to make political contributions or to do political work, and from any form of employment discrimination based on political considerations. In a letter which accompanied the consent decree, the parties set forth the agreed preconditions to its entry. First, plaintiffs were to arrange to have the operative terms of the agreement apply as well to the Republican Governor's patronage in the Northern District of Illinois, and to the Chairman of

the Republican County Central Committee of Cook County. Second, the consent decree was to be approved by the court as a settlement under Rule 23(e), Fed. R. Civ. P.

Pursuant to their agreement, plaintiffs filed an amended complaint, adding counts VII and VIII. These counts contain allegations analagous to those in the original six counts, but directed toward the patronage practices of the regular Republican Party organization in the Northern District of Illinois outside the City of Chicago. Those named as defendants in counts VII and VIII include various state government officers, the Republican State Central Committee and its Chairman, the Republican County Central Committee for each of the eight counties then in the Northern District of Illinois, Eastern Division, and various government officers and Republican Party officials in the subject counties. Many of the Republicans, including the Governor and the Chairman and other members of the Republican County Central Committee of Cook County agreed to be bound by the terms of the proposed consent decree.[2] All of the Democratic defendants, except Cook County Sheriff Elrod and the Chicago Park District, agreed to the terms of the consent decree.

The court then certified classes of independent candidates, independent voters, and certain taxpayers on each of the eight counts of the amended complaint. Pursuant to Rule 23(e), notice of the proposed consent decree was given. In April, 1972, a hearing was held as to the propriety of the decree. Finally, on May 5, 1972, the court approved the proposed consent decree, and entered it.

The May 5, 1972, consent decree is attached as an appendix to this opinion. In its central provisions, the decree enjoined the defendants, their successors and

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[2] The amended complaint and further supplements have also named additional Democratic officeholders as defendants, as well as several successors in office to those previously named.

agents, from "conditioning, basing, or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor," and from "knowingly causing or permitting any employee to do any partisan political work during the regular working hours of his or her governmental employment." Further, the decree specifically declared that "compulsory political financial contributions by any governmental employee, contractor or supplier" and "all compulsory or coerced political activity by any governmental employee" were prohibited, and that "once hired, a governmental employee is free from all compulsory political requirements in connection with his governmental employment." However, the decree expressly affirmed the rights of government employees to engage, voluntarily and on their own time, in any lawful political activity. Finally, the decree stated that the court retained jurisdiction to determine, among other things, whether political sponsorship or other political considerations can lawfully be taken into account in the consenting defendants' *hiring* practices, and what further remedies or implementing procedures might be appropriate to enforce the terms of the decree.

Following entry of the consent decree, the various Democratic and Republican defendants who were not parties to the decree filed motions to dismiss. Judge Marovitz granted one of these motions in part. *Shakman v. Democratic Organization of Cook County*, 356 F. Supp. 1241 (N.D. Ill. 1972).[3]

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[3]The motions to dismiss raised two important arguments. First, it was asserted that the Seventh Circuit's Shakman opinion did not condemn all hiring and firing of patronage employees based on political considerations, but only the use of hiring and firing practices to coerce political work or contributions. Judge Marovitz found this argument to be persuasive:

(Footnote continued on the following page)

After Judge Marovitz ruled on the motions to dismiss, the plaintiffs and the two Democratic defendants who

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3 *(Continued)*

> . . . *Shakman* prohibits only political considerations *which effect voter and candidate rights.* The firing of Republicans by incoming Democrats and vice versa is permitted so long as retention is not conditioned on coerced political activity or contributions. Likewise, Republicans have every right to hire only Republicans and Democratic office holders have every right to hire only Democrats so long as coerced political activity is not a condition of that employment.
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> * * * *
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> We therefore grant the defendant's motion to strike and dismiss those portions of the complaint which assert violations of rights through any political activity which does not affect voter-candidate-taxpayer rights and strike that portion of the prayer for relief which seeks the enjoining of *all* and *any* political considerations in public employment.

356 F. Supp. at 1248 (emphasis in original). Secondly, defendants argued that the Seventh Circuit's opinion prohibited only coerced political activity by government employees on public time, as opposed to the employees' own time. This argument, however was rejected:

> The Court of Appeals decision both explicitly and implicitly indicated that any activity which effects *the voter-candidate rights* of plaintiffs is prohibited and we believe that no distinction ought to be drawn between coerced political activity which is performed on public time and that performed on the employees own time if it emanates from the same source of coercion since both activites result in violations of plaintiffs' rights.

356 F. Supp. at 1248 (emphasis in original).

To the extent that the first point made by Judge Marovitz rests on a holding that Democrats may fire Republicans as long as there is no coercion involved, it has been overruled by *Elrod v. Burns,* 427 U.S. 347 (1976), and *Illinois State Employees Union v. Lewis,* 473 F. 2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928, 943 (1973); *see Lewis,* at 577-78 (Campbell, J. concurring) and is no longer good law, see pp. 36-37 *infra.* To the extent

(Footnote continued on the following page)

were not parties to the consent decree, Cook County Sheriff Elrod and the Chicago Park District, negotiated stipulated statements of fact regarding all issues remaining in the case.

Subsequently, the Democratic defendants who were parties to the consent decree began to negotiate with plaintiffs in an effort to resolve without trial the factual issues relevant to their remaining dispute over hiring practices. The negotiations continued until the summer of 1977. At their conclusion, the following defendants submitted agreed sets of responses to requests to admit:

1. The Democratic County Central Committee of Cook County and its members, including its Chairman, George W. Dunne,
2. The City of Chicago,
3. George W. Dunne, individually and as President of the Board of Commissioners of Cook County,
4. Morgan M. Finley, individually and as Clerk of the Circuit Court of Cook County,
5. Thomas M. Tully, then the Assessor of Cook County,
6. Stanley J. Kusper, as Clerk of Cook County,
7. Edward J. Rosewell, as Treasurer of Cook County,
8. The Forest Preserve District of Cook County, through its President, George W. Dunne.

Particular stipulations are discussed in greater detail below, *see* pp. 39-41; 43-50 *infra*, but the court will outline their scope here in order to facilitate full understanding of the legal issues.

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3 *(Continued)*

that Judge Marovitz held that plaintiffs could only receive relief for illegal practices that affected their own rights, his holding remains good law. *See* pp. 16-17 *infra*. *See also* note 6 *infra*.

The parties stipulated that in each ward of the City of Chicago and in many townships in Cook County there is a regular Democratic organization. The ward or township Democratic Party Committeeman is normally the head of the local organization, although certain regular organizations have separate heads in wards or townships controlled by "independents." The heads of the ward and township organizations sponsor candidates for public jobs with the City, Cook County, various County officers, the Forest Preserve District, and the Park District.

Preference in the hiring of employees for over 20,000 positions in these agencies is given to persons who have the sponsorship of a local organization head. Indeed, public notice of the availability of these jobs is not normally given. Usually, job applicants can only obtain Democratic sponsorship by having performed political precinct work or by promising to perform such work for candidates endorsed by the sponsor. Applicants will not normally be sponsored if they have been a worker for any political group opposed to the regular Democratic organization, although such persons are occasionally sponsored if they agree to switch political affiliations and work to support the regular Democratic organization. The sponsorship is usually communicated to the employing agency by means of a letter.

There are, on the average, over 250 governmental employees per ward in the City who were sponsored by the regular Democratic organization for their job. Since the City wards average about sixty precincts per ward, there are, on the average about four patronage government employees in each precinct in the City. A significant number of these persons do political work on behalf of persons supported by sponsoring regular Democratic organization officials.

Most importantly, the defendants admit that the political precinct work done by these patronage workers "helps

elect candidates supported by the various members of the Democratic County Central Committee." They also admit that "[t]his is one of the purposes of giving the preference in hiring." *E.g.*, Response of City of Chicago to Request for Admission, at 3.

After the stipulations were completed, the plaintiffs filed a motion for summary judgment against two groups of Democratic defendants: (1) the "consenting defendants," consisting of the eight defendants who filed agreed answers to requests to admit, including the named individuals in their individual as well as official capacities, and Michael A. Bilandic, then mayor of Chicago, in both his individual and official capacities, and (2) the "non-consenting defendants," Cook County Sheriff Richard Elrod and the Chicago Park District. Plaintiffs' motion seeks determinations of liability as to the hiring practices of the consenting defendants and as to the full range of politically motivated employment practices of the non-consenting defendants. Plaintiffs ask that an injunction similar to the consent decree be entered immediately against the non-consenting defendants. They suggest, though, that the question of appropriate relief as to the defendants' hiring practices should be left for "subsequent resolution."[4] In support of their motion, plaintiffs rely on the responses to requests to admit and the stipulations of fact, as well as certain affidavits and oral testimony given at prior enforcement proceedings in this action. Both the consenting and non-consenting defendants have also filed motions for summary judgment, supported by additional affidavits and other evidentiary materials.

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[4] The defendants oppose this suggestion. The court agrees with the plaintiffs that it is proper to decide the motions for summary judgment on the question of liability now, while reserving questions of remedy for another day. *See* C. Wright & A. Miller, 10 Federal Practice and Procedure § 2736. *See also* R. Kluger, Simple Justice, 657-747 (1975).

The stipulated admissions, affidavits and testimony of the parties remove from the case all issues of material fact. Therefore, the court enters this opinion as a general discussion of the rationale for its decision on the ultimate issues of the case as raised by the pending motions for summary judgment. *See* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2723, at 497-98; *Munoz v. International Alliance of Theatrical Stage Employees*, 563 F. 2d 205, 213 (5th Cir. 1977); *Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.*, 337 F. Supp. 674, 688 (N.D. Ill. 1972), *aff'd*, 486 F. 2d 717 (7th Cir.), *cert. denied*, 414 U.S. Ill 3 (1973).[5]

II. PRELIMINARY LEGAL ISSUES RAISED BY THE PARTIES DO NOT CONTROL THIS CASE

Under normal procedures, the court would now evaluate the factual record in light of the legal standard set out in the court of appeals' remand opinion. It would scrutinize that record to determine if "there is no genuine issue as to any material fact and . . . [if] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see, e.g., Cedillo v. International Association of Bridge Workers*, ___ F.2d ___, ___, No. 78-2109, slip opinion at 2 (7th Cir. July 6, 1979). Both parties claim that upon completing this task, the court will find that they are entitled to summary judgment.

Both the defendants and the plaintiffs, though, also urge the court to consider a preliminary argument. The defendants argue that the Supreme Court's decisions invoking the principles of comity and federalism show that

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[5] The court is also entering today certain specific supplemental findings of fact. The court finds that there is no genuine issue present concerning any of these facts. Since these findings are not likely to be of general interest, they are being released via an unpublished order, and not as part of this opinion.

this court must refrain from granting the plaintiffs any relief. The plaintiffs state that the Supreme Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), which outlawed political patronage firing practices, is directly applicable to the facts of this case and requires the court to rule in the plaintiffs' favor. Each side says that if the court rules in its favor on its claim, the court need not reach the more difficult questions required by the normal approach.

A. The Plaintiff's Cause of Action Is Not Impermissibly Inconsistent With the Principles of Federalism and Comity

The defendants, in their cross-motions for summary judgment, claim that the plaintiffs' cause of action impermissibly interferes with certain interests in federalism and comity recognized by recent Supreme Court cases. *See, e.g., Meachum v. Fano*, 427 U.S. 215 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Mayor v. Educational Equality League*, 415 U.S. 605 (1974); *O'Shea v. Littleton*, 414 U.S. 488 (1974). They claim that granting the plaintiffs any relief would impermissibly interfere in the ongoing conduct of state government and violate fundamental principles of our federal system.

The court believes this argument is nothing more than an attempt to relitigate the issues of standing, justiciability, and the existence of a political question. Those issues were decided against the defendants by the court of appeals in the *Shakman* opinion, 435 F. 2d 267, 270-71 (7th Cir. 1970) and that decision is the law of the case.[6] In any

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[6] The law of the case doctrine, *see, e.g., James Burrough Ltd. v. Sign of Beefeater, Inc.*, 572 F. 2d 574, 577 (7th Cir. 1978), would not bar the court from ruling on the defendants' claim if there had in fact been a change in the law. A prior decision by an appellate court in the same case is not binding when

(Footnote continued on the following page)

event, the Supreme Court's decision in *Elrod v. Burns*, *see* pp. 14-15 *infra*, clearly establishes that illegal patronage practices can be challenged in court, and that the court has authority to grant relief to the plaintiffs, where appropriate, *Elrod v. Burns*, 427 U.S. 347, 351-53 (1976) (plurality opinion); *id.*, at 377 n.1 (Powell, J., dissenting) (agreeing with plurality that patronage firing claims before the court were justiciable and not barred by the political question doctrine).

The defendants' talk of "dual sovereignties" will not be allowed to obscure the true issues in this case. Even though local authorities have the primary responsibility for dealing with local matters, if local authorities fail in their obligations under federal law, federal judicial authority may be invoked. *See, e.g., Miliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *Elrod*, 426 U.S. at 352 (1976) (plurality opinion); *Brown v. Board of Education*, 349 U.S. 294, 299 (1955); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 852-53, (N.D. Ill. 1979).

B. The Supreme Court's Patronage Ruling in *Elrod v. Burns* Is Not Dispositive

The plaintiffs invite this court to hold that a subsequent legal development entitles them to relief on grounds separate from those suggested by the Seventh Circuit's

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6 *(Continued)*
"controlling authority has since made a contrary decision of the law applicable to such issues." *Morrow v. Dillard*, 580 F. 2d 1284, 1290 (5th Cir. 1978) (quoting *White v. Murtha*, 377 F. 2d 428, 431-32 [5th Cir. 1967]); *see Kimball v. Callahan*, 590 F. 2d 768, 771-72 (9th Cir.) (citing *White*), *cert docketed*, No. 78-1538, 47 U.S.L.W. 3684 (Apr. 9, 1979); *Chicago and North Western Transportation Co. v. United States*, 574 F. 2d 926, 930-31 (7th Cir. 1978) (same); *Petition of United States Steel Corp.*, 479 F. 2d 489, 494 (6th Cir. 1973) (same).

Shakman decision.[7] Three years ago, in *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court held that patronage workers could not be fired because of their political affiliation. The plaintiffs suggest that the present case can be resolved simply by applying the *Elrod* holding to the patronage promotion and hiring issues present in this case.

Such an argument is very straightforward. The lead opinion in *Elrod*, written by Justice Brennan for a plurality of three Justices, found that the practice of patronage places substantial restraints on freedoms of belief and association.

> Patronage . . . to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis*, 473 F. 2d [561] at 576 [(7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973)]. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

427 U.S. at 357. The plurality opinion then rejected several proferred justifications for the practice of patronage firing, including the absence of any right to government employment, *id.* at 360-61, the need to ensure effective government and the efficiency of public employees, *id.*, at 364-66, the increased accountability to the public of patronage employees, *id.*, at 366-67, the need for political loyalty of employees in order to assure that representative government is not undercut by obstructionist tactics, *id.*, at 367-68, and the preservation of the democratic process, *id.*, at 368-72.

There is no question that the rationale of the *Elrod*

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[7] *See* note 6 *supra*.

plurality opinion is applicable to the facts of this case.[8] *See id.*, at 357-61 & 358 n.11, 359-60 n.13. Nevertheless, the court cannot simply apply *Elrod* and hold that the defendants' conduct is illegal, for these plaintiffs do not have standing to attack the constitutional validity of the defendants' infringement of job applicants' rights.[9]

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[8] Justice Powell, in his dissent in *Elrod*, implied that patronage hiring practices may infringe first amendment interests more strongly than patronage firing practices do. *See* 427 U.S. at 380-81 & 381 n.4 (Powell, J., dissenting).

[9] In addition, the *Elrod* plurality opinion is not necessarily controlling. Justices Stewart and Blackmun, who concurred in *Elrod*, concurred only in the judgment. They specifically refused to join in the "plurality's wide-ranging opinion," and they also specifically declined "to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party . . . ." 427 U.S. at 374. Although Justice Stevens might well join the plurality, *see Illinois State Employees Union v. Lewis*, 473 F. 2d 561 (7th Cir. 1972) (Stevens, Circuit Judge), *cert. denied*, 410 U.S. 928, 943 (1973); *see also Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S. ___, ___, 99 S.Ct. 983, 994 (1979) (Stevens, J., concurring in the judgment) (Illinois cannot discriminate among political parties in access to the ballot), either Justice Stewart's or Justice Blackmun's vote would still be needed to create a majority. In order to apply the *Elrod* plurality's opinion to the promotion and hiring practices at issue in this case, this court would therefore have to compare that decision with other Supreme Court decisions to determine *Elrod's* generality validity.

Some courts and commentators have suggested that the *Elrod* plurality opinion is fully consistent with other Supreme Court decisions, and that basing hiring or promotion for government jobs on political affiliation is unconstitutional *per se*. *See Finkel v. Branti*, 457 F. Supp. 1284, 1289 n.9 (S.D.N.Y., 1978) (*Elrod* concurrence and plurality both rely on *Perry v. Sindermann*, 408 U.S. 593 [1973] [broadly prohibiting the conditioning of government benefits on the exercise of first amendment rights]), *aff'd*, 598 F. 2d 609, No. 78-7494 (2d Cir. Feb. 20) (unpublished order), *cert. granted*, ___ U.S. ___, 99 S.Ct. 3095 (1979); *Stegmaier v.*

(Footnote continued on the following page)

When the Seventh Circuit held that the plaintiffs' complaint in this case stated a cause of action, it did so because the plaintiffs alleged that the challenged patronage practices, if proven, infringed the plaintiffs' own rights as candidates and voters. Such an infringement creates a case or controversy between the plaintiffs and the defendants and gives this court so-called "constitutional" standing under Article III to adjudicate the complete legality of the challenged practices. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Frissell v. Rizzo*, 597 F. 2d 840, 843 (3rd Cir.) *cert. docketed*, No. 78-1890, 48 U.S.L.W. 3001 (June 20, 1979). Alone, though, that is not enough to give the court final standing to proceed. The court must also apply certain non-constitutional, "prudential" standing rules to determine whether the plaintiffs are the proper parties to raise the job applicants' interests. *See Silva v. Bell*, ___ F.2d ___, ___,

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9 *(Continued)*

Trammel, 597 F. 2d 1027, 1033-34 (5th Cir. 1979) (collecting authorities); *Rosenthal v. Rizzo*, 555 F. 2d 390, 392 (3d Cir. 1977). *Cf. Keyishian v. Board of Regents*, 383 U.S. 589, 605-06 (1967) ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"); *United Public Workers v. Mitchell*, 330 U.S. 100 (1949) ("[n] one would deny" "that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office") (dicta). *See generally Illinois State Employers Union v. Lewis*, 473 F. 2d 561, 569-72 (7th Cir. 1972) (Stevens, J.) (discussing Supreme Court cases), *cert. denied*, 410 U.S. 928, 943 (1973). *See also Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977) (It is clear "that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment") (citing *Elrod* plurality opinion, *Perry*, and *Keyishian*).

There is a strong argument that the Seventh Circuit's decision in *Lewis, supra*, demonstrates that the *Elrod* plurality opinion is the law in this circuit, and that patronage promotional and hiring practices may be illegal *per se* under applicable circuit authority. *Cf.* pp. 56-58 *infra*.

No. 79-1154, slip opinion at 10-11 (7th Cir. Aug. 23, 1979).

> [E]ven when a litigant has demonstrated a concrete and particularized injury to himself, he is usually permitted to assert only his own legal rights as a ground for decision in his favor, not those of third parties not before the Court. *Warth v. Seldin, supra*, 422 U.S. at 499, 514; *United States v. Raines*, 362 U.S. 17 (1960).

Frissell v. Rizzo, 597 F. 2d 840, 844 (3rd Cir.) (in absence of any allegation that a newspaper had actually been inhibited in its reporting of the news by mayor's action in denying customary public advertising to the paper as a reprisal for the publication of unfavorable news articles, or that the newspaper was in some manner prevented from asserting its own First Amendment rights, the taxpayer-citizen lacked standing to sue to vindicate the newspaper's rights), *cert. docketed*, No. 78-1890, 48 U.S.L.W. 3001 (June 20, 1979). The plaintiff class in this case was not certified as a class of government employees or applicants for government jobs. There has been no showing that the plaintiffs represent such government employees and applicants, or that the employees and applicants are for some reason unable or unlikely to bring suit themselves. Accordingly, the court must conclude that the plaintiffs are not proper parties for a challenge of patronage hiring and promotion practices as they affect employees and applicants. Instead, the defendants' conduct must be analyzed solely under the Seventh Circuit's decision in *Shakman* and other applicable court decisions interpreting the rights of candidates and voters.[10]

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[10] The plaintiffs also suggest that the court could grant them summary judgment on the issue of hiring merely as further implementation of the present consent decree. The court questions whether such a result would be possible, especially in the absence of documented, massive violations of the decree. That question need not be decided, though, given the result reached today by the court.

III. THE LEGAL FRAMEWORK FOR REVIEWING THE CHALLENGED PRACTICES

A. The Shakman Decision Does Not Provide Clear Guidance to This Court as to the Applicable Legal Framework for This Case

In the years since the Seventh Circuit decided *Shakman*, the Supreme Court has developed a more complicated analytical framework for evaluating the constitutional validity of government laws or practices that are alleged to infringe on the first and fourteenth amendment rights of candidates and voters. In most recent first and fourteenth amendment cases, the court specifically identifies the protected constitutional interests that are infringed. It then applies a balancing or strict scrutiny test, as appropriate, [11] to weigh the infringed rights against the interests asserted by the state to justify the statute. On the basis of that determination, the court makes its ultimate ruling on the constitutionality of the challenged law or practice. In contrast, the operative section of the court of appeals' decision in *Shakman* is relatively brief.

> It is clear that at least some aspects of the interests of candidates in an equal chance and of the

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[11] In first amendment cases of this nature, a balancing test is usually used. *See generally,* L. Tribe, American Constitutional Law, §§ 12-1 to 12-36 (discussing first amendment doctrine). Under fourteenth amendment analysis, strict scrutiny is applied when a fundamental interest or suspect classification is at stake. *See generally San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973); Tribe, §§ 16-1 to 16-57, 13-1 to 13-31.

In first amendment balancing cases that involve substantial infringements of protected first amendment rights, the balancing analysis usually reduces to the strict scrutiny test. *See* note 12, *infra.* Therefore, the court will occasionally use the phrase "strict scrutiny" to refer both to fourteenth amendment analysis and to the tilted first amendment balancing approach justified by the first amendment violations found herein.

> interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.
>
> The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection. "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." [Quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944).]
>
> The equal protection clause secures from invidious official discrimination the voter's interest in a voice in government of equal effectiveness with other voters.
>
> We acknowledge that the decisions just referred to involved mechanical aspects of the election process: *e.g.*, the right to cast a vote, a candidate's place on the ballot, and equal size in districts entitled to a representative. The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury resulting from inequality in election procedure.

435 F. 2d at 270.

At first glance, the court of appeals decision appears to be lacking in instructions to this court as to how this court should proceed under a later-developed constitutional analysis. In the first paragraph, the court mentioned that "some aspects" of the rights asserted by the plaintiffs are "secured from state action by the equal protection clause of the fourteenth amendment." In the second paragraph, the court said that certain of the plaintiffs' "interests" were "entitled to constitutional protection." Though the third and fourth paragraphs have some specific language, the

opinion concludes "that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure."

There are two apparent gaps in the opinion that make analysis difficult. First, while there is general discussion of the protected nature of "the voter's interest in a voice in government of equal effectiveness with other voters" and a right of some sort to protection "from injury resulting from inequality in election procedure," these rights do not appear to be precisely defined and their scope is not stated. Second, while the court of appeals repeatedly used the phrase "constitutional protection," it did not define the nature of that protection. The equal protection clause has been construed to provide protection against all government decisions to the extent that it forbids irrational classifications among those upon whom a challenged law or practice acts. See *e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 Sup. Ct. Rev. 95, 106-07. If the court of appeals meant to refer solely to this general protection, the challenged patronage practices would be subject to only a weak standard of review. *See generally, e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). If the Seventh Circuit intended that this court apply a heightened form of judicial scrutiny, whether through a balancing test or through strict scrutiny, it failed to identify the manner in which this court would proceed. Thus, this court will have to turn to other, subsequent decisions in order to perform the necessary constitutional analysis of the factual stipulations submitted by the parties.

Unfortunately, the Supreme Court and the Seventh Circuit have followed more than one approach in analyzing possible infringements of first and fourteenth amend-

ment rights. *See Woodward v. City of Deerfield Beach*, 538 F. 2d 1081, 1082 n.1 (5th Cir. 1976).[12] Usually, the Supreme Court identifies the protected constitutional interests infringed by the challenged government action, then evaluates the importance of the protected interests against the degree of the infringement and the weight and nature of the state interests that assertedly justify the decision. In some areas, however, the Supreme Court and Seventh Circuit have repeatedly faced similar fact patterns. In those cases, regularized analytical frameworks have developed.

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[12] Deprivations of political and associational rights can be analyzed under both the first and fourteenth amendments. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 n.3 (1972) (collecting authorities). The Fifth Circuit's discussion of this point in *Morial v. Judiciary Commission of Louisiana*, 565 F. 2d 295 (5th Cir. 1977) (en banc), *cert denied*, 435 U.S. 1013 (1978), is instructive.

> The plaintiffs couch their complaint in the language of the equal protection clause of the fourteenth amendment as well as in the language of the first. While it is true that a first amendment claim typically takes the form of an assertion that the government cannot deprive the plaintiff of some freedom and an equal protection claim takes the form of an assertion that the government may not single out the class of which the plaintiff is a member for deprivation, it is equally true that every first amendment claim can be transformed into an equal protection claim merely by focusing upon the classification that every legislative scheme embodies. It is, therefore, generally appropriate to employ the same standard of scrutiny to the derivative equal protection claim as would be applied to the underlying claim of a substantive deprivation. *See American Party v. White*, 415 U.S. 767, 778 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The *method* of equal protection analysis, however, retains independent worth even in such cases. Highlighting the legislative classification serves to illumine the state's interest in burdening those of the plaintiff's class and

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The court will first undertake a "traditional" analysis of the challenged patronage practices to determine whether protected constitutional interests have been infringed. It will also evaluate the challenged practices against the group of Seventh Circuit cases that present factual circumstances most similar to those in the instant case. After concluding under both tests that the protected constitutional rights of the plaintiffs are infringed by the defendant's conduct, the court will strictly scrutinize those practices to determine whether they can be constitutionally justified.

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12 *(Continued)*

> the necessity of doing so in order to advance that interest.

565 F.2d at 304 (emphasis in original) (footnote omitted). In first amendment cases, a court usually identifies the infringed first amendment rights and the asserted government interests. It then "balances" one against the other. The weight of the government interests needed to justify the decision and the closeness of the means-end "fit" between the interests and the decision varies directly with the importance of the plaintiff's infringed interests and the degree of the infringement. *See Morial,* 565 F.2d at 300; *Barry v. District of Columbia Board of Elections,* 448 F. Supp. 1249, 1252 (D.D.C. 1978), *appeal dismissed,* 580 F.2d 695 (D.C. Cir. 1978). Under the fourteenth amendment, certain kinds of classifications are subject to "strict scrutiny," while most classifications receive almost no scrutiny at all. *See Wilson v. Harris,* F. Supp. ___, ___-___, Nos. 73 C 2337, 73 C 3070, slip opinion at ___-___ (N.D. Ill. Sept. ___, 1979) (collecting authorities). A sliding-scale balancing approach has generally been rejected under the fourteenth amendment. *See Craig v. Boren,* 429 U.S. 190, 197 (1976). *But see Illinois State Board of Elections v. Socialist Workers Party,* ___ U.S. ___, ___, 99 S.Ct. 983, 993 (1979) (Blackmun, J., concurring); *Woodward v. City of Deerfield Beach,* 538 F.2d 1081, 1082 n.1 (5th Cir. 1976) (suggesting that Supreme Court has used a balancing test in equal protection cases involving candidates). *See also* note 11 *supra.*

B. A Constitutional Analysis of the First and Fourteenth Amendment Interests at Stake

The purposeful attempt of the defendants to hinder independent candidates burdens central first and fourteenth amendment values.[13] A traditional constitutional analysis of the challenged patronage practices must begin with an identification of the precise first and fourteenth amendment interests at stake. *See Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S. ___, ___, 99 S.Ct. 983, 990 (1979) (equal protection case).

The defendants' patronage hiring practices directly burden the plaintiff candidates' interests in running successfully for public office. Such a burden, however, is not by itself an infringement of constitutionally protected rights, for the Supreme Court has never recognized that interest alone as warranting special first amendment protection or as being a fundamental right under the equal protection clause. *See Bullock v. Carter*, 405 U.S. 134,

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[13] It is not relevant that the defendants are acting pursuant to their own discretion and that their conduct is not mandated by any statute.

> The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws. The basic principle was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886):
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> > Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
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> *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973) (en banc). *Accord, Monell v. Department of Social Services*, 436 U.S. 658 (1978).

142-43 (1972); *Trafelet v. Thompson*, 594 F.2d 623, 632 (7th Cir.), *cert. docketed*, No. 78-1917, 48 U.S.L.W. 3001 (June 25, 1979); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). Instead, the Supreme Court and Seventh Circuit have recognized three closely related interests meriting special constitutional protection that are infringed or otherwise burdened by the defendants' challenged conduct. *See Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977); Note, *Newcomb v. Brennan: The Right of a Public Employee to Seek Political Office*, 73 Nw. U.L. Rev. 533, 535-37 (1978). They are: (1) the interests of the plaintiff candidates in political expression; (2) the interests of the plaintiff voters and candidates in association for the advancement of their political beliefs; (3) the interests of the plaintiff voters in equal participation in the electoral process. Taken together, *see Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977) (en banc) (infringed interests must be aggregated to determine the degree of the constitutional violation), *cert. denied*, 435 U.S. 1013 (1978), these interests give a candidate a protected constitutional interest in freedom from official discrimination on the basis of his political beliefs.

1. The candidates interest in political expression

Freedom from government-imposed restrictions on the content of belief or expression is the central premise of free speech as guaranteed by the first amendment.[14] *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); *New York Times v.*

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[14] This is not to say that some narrow types of content restriction are not permissible. *See Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 291 (1978).

Sullivan, 376 U.S. 254, 270 (1964); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 291 (1978). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).[15] *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). This is especially true where political belief and expression are involved. "It can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). *See Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977); *id.*, at 259 (Powell, J., concurring in the judgment); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1975); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

To the extent that the allegations of the present complaint are true, *see* pp. 42-50 *infra*, the defendants have clearly burdened the plaintiff candidates' rights of free political belief and expression. As noted above, impairment of a candidate's efforts to obtain public office cannot, in itself, be equated with interference with protected first amendment freedoms. *Trafelet v. Thompson*, 594 F.2d 623, 632 (7th Cir. 1979), *cert. docketed*, No. 78-1917, 48 U.S.L.W. 3001 (June 25, 1979); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977); *see Bullock v. Carter*, 405 U.S. 134, 143 (1972). Here, however, it is alleged that the defendants have intentionally

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[15] The Seventh Circuit has recently held that *Mosley* remains good law. *See Brown v. Scott*, ___ F.2d ___, ___, No. 78-2432, slip opinion at 6-7 (7th Cir. August 2, 1979). *See also Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir.) (following *Mosley*), *cert. denied*, ___ U.S. ___, 99 S.Ct. 291 (1979).

used the power of the state to impede plaintiffs' candidacies because plaintiffs have chosen to run in opposition to the Democratic organization. Where state officials burden an individual's candidacy in order to discourage opposition to some more favored candidate or viewpoint, their actions constitute a punishment based on the content of a communicative act. *Newcomb v. Brennan*, 558 F.2d at 828.[16] As the court observed in *Newcomb*, "[p]laintiff's interest in running for . . . [public office] . . . and thereby expressing his political views without interference from state officials who wished to discourage the expressions of those views lies at the core of the values protected by the first amendment." 558 F.2d at 829.

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."
>
> . . . .
>
> [G]overnment must afford all points of view an equal opportunity to be heard.

Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (citation omitted); *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir.) (quoting *Mosley*), *cert. denied*, ___ U.S.___, 99 S.Ct. 291 (1978). "[T]he essence of the first amendment is its denial to government of the power to determine which message shall be heard and which suppressed . . . " Karst,

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[16] *Cf. Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 1013 (1978) (resign to run statute was not a penalty on the belief or expression of any particular idea).

Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 28 (1975) (discussing *Mosley*). "[A] concern about content . . . is never permitted." *Mosley*, 408 U.S. at 99 (citation omitted).

2. Freedom of association

> [The Supreme Court's] decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 355-357 [(1976) (plurality opinion)]; *Cousins v. Wigoda*, 419 U.S. 477, 487 [(1975)]; *Kusper v. Pontikes*, 414 U.S. 51, 56-57 [(1973)]; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 [(1958)].

Abood v. Detroit Board of Education, 431 U.S. 209, 233 (1977). The right of association is closely allied to freedom of speech and, like free speech, lies at the foundation of a free society. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). Because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, the first amendment guarantees the freedom to "associate with others for the common advancement of political beliefs and ideas . . . " *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams v. Rhodes*, 393 U.S. 23, 30 [(1968)]." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

In the present case, the defendants have burdened the rights of the plaintiff candidates and voters to associate. The Supreme Court has repeatedly stated that candidacy restrictions which have the effect of excluding certain candidates from the ballot burden the associational rights of those candidates and their supporters by rendering less valuable their freedom to collectively advance political

ideas. *E.g., Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S.___, ___; 99 S.Ct. 983, 990 (1979); *Williams v. Rhodes*, 393 U.S. 23 (1968). In much the same way, when the state acts to oppose the electoral efforts of certain candidates on the ballot, it renders less valuable the associational rights of those candidates and their supporters.

3. Equal participation in the electoral process

There is no constitutional right to vote, as such. Nevertheless, the equal protection clause confers the substantive right to participate on an equal basis with other qualified voters whenever the state has adopted an electoral process for determining who will represent any segment of the state's population. *Lubin v. Panish*, 415 U.S. 709, 713-14 (1974); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring); *Kramer v. Union School District*, 395 U.S. 621 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1971). "[E]ach and every citizen has an inalienable right to full and effective participation in the political process . . . ." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). This right of qualified voters to cast their votes effectively is clearly fundamental. *E.g., Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S. ___, ___, 99 S.Ct. 983, 990 (1979). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Thus, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Since voters can only express their rights by voting for particular candidates, aspects of candidacy are "intertwined" with the

rights of voters. *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

The allegations of the present complaint indicate that the defendants have interfered with the rights of the plaintiff voters to equal participation in the electoral process. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267, 270 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). Equal electoral participation "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the francise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 57 (1975) ("the holding of *Reynolds v. Sims*, is that a state cannot constitutionally discriminate among voters by giving some interests greater proportional weight than is justified by the numbers of people who share those interests"). This principle frequently has been invoked in striking down legislative apportionment plans resulting in the numerical dilution of votes. While the complaint in this case does not present such a claim, it does involve allegations of similar types of inequality. The state is alleged to work against and make more difficult the election of certain candidates. To the extent this is true, *see* pp. 43-50 *infra*, the value of the votes of those supporting those candidates, in terms of their ability to affect the outcome of an election, is lessened.

C. The Candidates' Interest in Freedom from Official Discrimination on the Basis of Their Political Beliefs - The Ballot Placement Cases

1. The two-part Bohus test

The analysis conducted in Section B, pp. 21-27 *supra*, demonstrates that if the allegations of the complaint are true, the patronage practices challenged in the complaint infringe the first and fourteenth amendment rights of the plaintiff candidates and voters. As noted above, it is help-

ful in considering the implications of this legal conclusion to carefully review those Supreme Court and Seventh Circuit cases which present factual settings closest to the present case. *Cf. Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 304 (5th Cir. 1977) (en banc) (first and fourteenth amendment analytical approaches should both be applied, even though result will normally be the same), *cert. denied*, 435 U.S. 1013 (1978). In so doing, this court can have the benefit of the analytical framework used by higher courts in the most closely analogous setting.

Of all the cases dealing with the rights of candidates and voters, the line of cases that is most directly applicable to the facts of this case is the line of ballot placement cases. Ballot access cases, for example, usually allege the effectively complete exclusion of certain candidates or types of candidates from the ballot. Suffrage cases involve either the total exclusion of a class of voters from the electoral process or an identifiable dilution and debasement of their vote. Ballot placement cases, however, involve allegations of governmental interference with the equality of the electoral process in a manner and to a degree similar to that charged in the present case. In ballot placement cases, unlike ballot access cases, the government has not excluded any candidate or candidates from the electoral process. Instead, the government is charged, as in the present case, with acting so as to favor, to some relatively small degree, certain candidates because of their political affiliation.

In recent years, the Seventh Circuit has decided a clearly discernible line of ballot placement cases. *Board of Election Commissioners v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied* ___ U.S.___ , 99 S.Ct. 2840 (1979); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir.), *cert. denied*, 435 U.S. 939 (1977); *Baum v. Lunding*, 535 F.2d 1016 (7th Cir. 1976); *Bohus v. Board of Education*, 447 F.2d 821 (7th Cir. 1971); *Weisberg v. Powell*, 417 F.2d 388 (7th

Cir. 1969) (per curiam). In these cases, the Seventh Circuit has analyzed the effect of various ballot placement schemes on voters' and candidates' interests in political expression, association, and equal participation in the electoral process. The consistent holding of these cases has been that "[a] successful challenge to ballot placement procedure under the equal protection clause requires a showing of 'an intentional or purposeful discrimination by authorities in which one class is favored over another.' *Bohus v. Board of Election Commissioners*, 447 F.2d at 822." *Board of Election Commissioners v. Libertarian Party*, 591 F.2d at 25.[17] In addition, the plaintiff must prove that the challenged election process "is an advantage in an election." *Board of Election Commissioners v. Libertarian Party*, 591 F.2d at 25 n.3 (citing *Bohus*); *Sangmeister v. Woodard*, 565 F.2d at 465 (citing *Bohus*); *see Baum v. Lunding*, 535 F.2d at 1018 (citing *Bohus*); *Weisberg v. Powell*, 417 F.2d at 392-93. *Cf. Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir. 1973) (per curiam) ("relief under the equal protection clause is appropriate where, as here, plaintiffs have shown a discriminatory design favoring a particular group against others") (candidate substitution case), *cert. denied*, 417 U.S. 910 (1974). The court adopts the standard of the *Bohus* case as the appropriate test in this case.

2. The degree of advantage required

The parties disagree as to the degree of advantage required by *Bohus*. The defendants present two arguments in support of their contention that the plaintiffs must satisfy a higher burden than the mere showing of "an advantage." First, they argue that the court of appeals' decision in this case requires that the plaintiffs show a "substantial, perhaps massive," 435 F.2d at 270, advantage in order to prove their case. Even if such a high standard is not necessary, they argue that the plaintiffs must at least

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[17] *See Snowden v. Hughes*, 321 U.S. 1 (1944).

demonstrate that the challenged patronage practices provide the defendants with a significant advantage, which they say the undisputed facts do not show here.

a. A "substantial, perhaps massive" advantage is not required

The defendants' first argument is based on a slight misreading of certain language in the court of appeals decision. What the court of appeals actually said was:

> The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create *a substantial, perhaps massive, political effort* in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

435 F.2d at 270 (emphasis added). This court does not construe the quoted language as requiring the plaintiffs to prove even a "substantial, perhaps massive, political effort" in order to prevail. Rather, the quoted language appears merely to be a characterization by the Seventh Circuit of the allegations of the plaintiffs' complaint.[18]

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[18] Even if the plaintiffs are required to prove a "substantial, perhaps massive, political effort," they have done so here. The defendants' stipulations, *see* pp. 10-11 *supra*, show that many of the over twenty thousand patronage employees perform political precinct work. There are an average of four patronage employeesfor each precinct in the City, and there are other such employees in many precincts in the area of the County outside the City. The existence of a force of many thousands of employees for the purpose of helping regular Democrats win election over Republicans and Independents shows, by itself, that the regular Democratic defendants make a "substantial, perhaps massive, political effort."

(Footnote continued on the following page)

In any event, the defendants err when they claim that the plaintiffs must show a "substantial, perhaps massive," advantage accrues to the regular Democrats due to the defendants' patronage practices. Such a claim is erroneous, for neither the *Shakman* opinion nor any other authority supports their attempt to apply the quoted language to the degree of advantage required by *Bohus*.

b. An actual, significant advantage is required

There is a legitimate argument, though, over the amount of the advantage that must be shown by the plaintiffs under the *Bohus* test. It is a general rule of constitutional law that heightened judicial scrutiny is not appropriate unless some significant effect has been felt on a protected interest. Unless there is more than a *de minimus* impact on the plaintiffs' interest in equal participation as

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18 *(Continued)*

The defendants also argue that the plaintiffs must prove that the scope of the challenged patronage practices must be "substantial relative to the size of the electorate." This argument is based on language from the plurality opinion in *Elrod:* "Patronage thus tips the electoral process in favor of the incumbent is based on language from the plurality opinion in *Elrod:* "Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant." *Elrod,* 427 U.S. at 356.

The court finds, however, that the crucial part of this passage is that which refers to tipping the electoral process in favor of the incumbent party. The Seventh Circuit cases have held, in effect, that that can be demonstrated by a showing that patronage is "an advantage," or "an actual, significant advantage" in elections. The scope of the patronage effort in relation to the size of the electorate can be probative of this fact, but proof of any particular ratio is not essential. It is sufficient that the advantage be proven by any appropriate means. *See* pp. 30-32 *infra*.

candidates and voters in the electoral process, the plaintiffs cannot prove a constitutional violation, *see Storer v. Brown*, 415 U.S. 724, 729 (1974) ("substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect") (primary affiliation case); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (heightened scrutiny required when there is "a significant interference' with the exercise of the constitutionally protected right of free association") (citation omitted) (primary affiliation case) *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (strict scrutiny mandated where a restriction on the right to vote has a "real and appreciable impact on the exercise of the franchise") (filing fee case); *Socialist Workers Party v. March Fong Eu*, 591 F.2d 1252, 1260-61 & 1261 n.5 (9th Cir. 1978) ("more than insubstantial" burden required) (following *Storer*) (ballot identification case); *cert. denied*, ___ U.S. ___, 99 S.Ct. 2167 (1979); *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978) (following *Bullock*) (residency requirement case), and will not be entitled to relief, *see Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977); *cf. Milliken v. Bradley*, 418 U.S. 717 (1974) (scope of remedy is limited to the scope of the violation). Thus, this court must construe the "an advantage test" to require some showing that an actual, significant advantage is received by the favored candidates.

An early expression of this requirement can be found in the Seventh Circuit's decision in *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969). There, the court of appeals evaluated a similar contention by the defendants in a ballot placement case.

> Defendants contend that plaintiff failed to prove that a candidate with first or second ballot position would enjoy a substantial advantage. This amounts to an argument that the device employed by the secretary was ineffective; that

> the discrimination was harmless. We think it was adequately established that top position on the ballot *is one of a number of factors which tend to affect the outcome of an election, and which may have a substantial effect although the degree varies with the circumstances.*

417 F.2d at 392 (emphasis added). The *Weisberg* statement remains good law. *See Culliton v. Board of Election Commissioners*, 419 F.Supp. 126, 127-28 (N.D. Ill. 1976) (quoting *Weisberg*), *aff'd sub nom. Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir.) (citing *Weisberg*), *cert. denied*, 435 U.S. 939 (1977). *See also Smith v. Cherry*, 489 F.2d 1098, 1102-03 (7th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 910 (1974).

Thus, the Seventh Circuit ballot placement cases show that the advantage need not be a massive or overwhelming one. It need not be the only, nor the dominant factor in deciding elections. The plaintiffs, in order to prevail, must show no more than that the challenged patronage practices are a significant advantage, an advantage that will help the regular Democrats win some elections.

The foregoing discussion of the ballot placement cases demonstrates that, even though there is no right to run for office, the rights of voters and candidates discussed in Section B, pp 21-27 *supra*, combine to give a candidate the right to be free from official discrimination on the basis of his or her political beliefs.[19] Those cases also provide a two-part test for determining whether this right has been violated. Once a plaintiff shows (1) an intentional discrimination by the government on the basis of his political beliefs that gives (2) an actual significant advantage in an election to his opponent, as defined in *Weisberg*, he or she has demonstrated an infringement of that right.

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[19] Similarly, voters have a right not to have their candidates' campaign deliberately disadvantaged by official action. *See* pp. 26-27 *supra*.

As in other first and fourteenth amendment cases, the defendants will then be obliged to demonstrate that the challenged law or practice can survive strict constitutional scrutiny, *i.e.*, that the challenged law or practice is necessary to the achievement of a compelling government interest. *See Board of Election Commissioners v. Libertarian Party*, 591 F.2d at 25; pp. 50-52 *infra*.[20] Without such a demonstration, the law or practice must be struck down as unconstitutional.

D. The Bohus Test is Consistent with General Theories of Fourteenth Amendment Motivation Analysis and with the Shakman Decision

The preceding sections have analyzed a candidate's interest in running for office in the manner usually applied in such cases, and have identified a test that is applicable to the present case. The origins of the *Bohus* test, and its necessary applicability to the *Shakman* case, are not immediately apparent. Closer investigation reveals that the *Bohus* test is in fact derived from general principles of fourteenth amendment equal protection analysis. *See Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir.) (*Bohus* test must be construed consistently with *Washington v. Davis*, 426 U.S. 229 [1976]), *cert. denied*, 435 U.S. 939 (1977).[21]

In recent years, the Supreme Court has decided several cases which discuss the scope of judicial review of improper legislative motivation under the equal protection clause of the fourteenth amendment. The most important of these cases, *Washington v. Davis*, 426 U.S. 229 (1976), disap-

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[20] *Cf. Barry v. District of Columbia Board of Elections*, 448 F.Supp. 1249, 1252 (D.D.C. 1978) (absent discrimination against identifiable class, candidacy restriction is not subject to strict scrutiny) (resign to run statute), *appeal dismissed*, 580 F.2d 695 (D.C. Cir. 1978).

[21] *See also* notes 11, 12 *supra*.

proved several earlier cases which had held that courts could not review a legislative or administrative decision to determine whether the decision's motivation had been proper.[22] The *Davis* Court held that judicial review of motivation could be proper under certain circumstances. This position has been amplified by several subsequent Supreme Court decisions. *See Columbus Board of Education v. Penick*, ___ U.S. ___, 99 S.Ct. 2941 (1979); *Personnel Administrator v. Feeney*, ___ U.S. ___, 99 S.Ct. 2282 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

One commentator who has written extensively on the problems of motivation analysis is Professor John Hart Ely.[23] *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207 (1970); Ely, *The Centrality and Limits of Motivation Analysis*, 15 San Diego L. Rev. 1155 (1978).[24] Professor Ely has made one point

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[22] *See Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968).

[23] The other major contributor in this area has been Professor Paul Brest. *See* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 Sup. Ct. Rev. 95; Brest, *The Supreme Court, 1976 Term–Forward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976). *See also, e.g.*, Symposium, *Legislative Motivation*, 15 San Diego L. Rev. 925 (1978).

[24] Ely's articles have been frequently cited by the Supreme Court for illumination of this area. *See Orr v. Orr*, ___ U.S. ___, ___ n.10, 99 S.Ct. 1102, 1112 n.10, (1979) (citing *Centrality and Limits*); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977) (citing *Legislative and Administrative Motivation*). *See also Personnel Administrator v. Feeney*, ___ U.S. ___, ___, 99 S.Ct. 2282, 2298 (1979) (Marshall, J., dissenting) (citing *Legislative and Administrative Motivation*); *Beer v. United States*, 425 U.S. 130, 148-49 n.4 (1976) (Marshall, J., dissenting) (citing

(Footnote continued on the following page)

that is particularly helpful in understanding the theoretical basis of the *Bohus* and *Shakman* decisions.

> [Judicial] analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant.* . . . To have a right to something is to have a claim on it irrespective of why it is denied.

Ely, *Centrality and Limits*, 15 San Diego L. Rev. at 1160-61 (emphasis in original) (footnotes omitted) (citing Ely, *Legislative and Administrative Motivation*, 79 Yale L.J. at 1281-84).

Applying Professor Ely's insight to the *Shakman* and *Bohus* cases, the foundation for the Seventh Circuit's approach in this area becomes apparent. If a candidate has a right to candidacy, no special motivation scrutiny would be appropriate. Any government action that adversely burdened, affected, or impacted upon that candidacy would be subject to heightened judicial scrutiny. Without a right to candidacy, judicial review protects plaintiffs' candidacies *per se*, only from those government decisions that are improperly motivated. Thus, it is entirely appropriate that

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24 *(Continued)*

Legislative and Administrative Motivation); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 n.20 (1974) (citing *Legislative and Administrative Motivation*); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 26 n.62 (1973) (citing *Legislative and Administrative Motivation*); *Palmer v. Thompson*, 403 U.S. 217, 264 (1971) (White, J., dissenting) (citing *Legislative and Administrative Motivation*).

a candidate can be protected from official discrimination against his or her candidacy,[25] because of his or her beliefs, even though there is no right to candidacy.

The *Shakman* case, when read with the ballot placement cases, can therefore be seen as holding that government action that deliberately uses the patronage system to favor one candidate over another is improperly motivated for purposes of motivation analysis.[26] The *Shakman* decision is in accord with related Seventh Circuit decisions, *see Trafelet v. Thompson*, 594 F.2d 623, 632 (7th Cir.) (classifications burdening groups of voters because of their political beliefs require strict scrutiny) (dicta), *cert. docketed*, No. 78-1917, 48 U.S.L.W. 3001 (June 29, 1979); *Board of Election Commissioners v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied*, ___ U.S. ___, 99 S.Ct. 2840 (1979); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir.), *cert. denied*, 435 U.S. 939 (1977); *Baum v. Lunding*, 535

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[25] The protected interest in being free from official discrimination against your candidacy can be stated, alternatively as an affirmative right: the right to equal participation in the process of running for office. *Cf. Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 304 (5th Cir. 1977) (en banc) (discussing interrelationship of first and fourteenth amendment rights), *cert. denied*, 435 U.S. 1013 (1978). Whether it is analyzed in terms of improper discriminatory motivation, or as a violation of this affirmative right is irrelevant. Either way, the plaintiff needs to show (1) an improper government purpose, and (2) some actual discriminatory effect, that is, some actual advantage received by his or her opponents and not received by the plaintiff.

[26] Or, to use synonymous analytical jargon, *Shakman* and the ballot placement cases hold that any classification based on political beliefs that is used to burden the attempt of particular groups to compete in the political process is suspect under the first amendment. *Accord, Trafelet v. Thompson*, 594 F.2d 623, 632 (7th Cir.) (dicta), *cert. docketed*, No. 78-1917, 48 U.S.L.W. 3001 (June 29, 1979). Any legislative or administrative decision that embodies a suspect classification is subject to strict constitutional scrutiny. *See* pp. 50-52 *infra*.

F.2d 1016 (7th Cir.); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (citing *Shakman*); *Smith v. Cherry*, 489 F.2d 1098, 1102-03 (7th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 910 (1974); *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 569 n.17 (7th Cir. 1972) (approving *Shakman*), *cert. denied*, 410 U.S. 928, 943 (1973); *Bohus v. Board of Education*, 447 F.2d 821 (7th Cir. 1971); *Briscoe v. Kusper*, 435 F.2d 1046, 1052 (7th Cir. 1970); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); *cf. United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc) (government is forbidden to discriminate on the basis of the exercise of protected first amendment activities);[27] and is not inconsistent with applicable Supreme Court decisions, *Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (government assistance to political campaigns must not give unfair advantages); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1973); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *cf. Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977) (freedom to believe as one will and not have belief forced upon you by the Government is at the heart of the first amendment). *See generally* pp. 21-34; note 9 *supra*. Interpreted in this fashion, the Seventh Circuit's opinion in *Shakman* is seen to be in general accord with current law.

> It is clear that at least some aspects of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.

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[27] *See also Rhode Island Minority Caucus v. Baronian*, 590 F.2d 372, 376 (1st Cir. 1979) ("privilege of holding public employment . . . may not be denied by the state on the basis of distinctions which violate federal constitutional guarantees").

> The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection.
>
> . . . The equal protection clause secures from invidious official discrimination the voter's [and the candidate's] interest in a voice in government of equal effectiveness with other voters.
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> . . . The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps, massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

435 F.2d at 270.

There is one possible difference in theory between the Seventh Circuit's *Shakman* opinion and the later case law discussed above. In the *Shakman* decision, the court of appeals may have assumed that proof that the patronage employees' political activity was coerced was a necessary part of the plaintiffs' case.

> One may foresee that in the areas of proof, and devising relief if the claims be proved, care will be required in order to distinguish between compelled and voluntary political support by public employees. Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression on their own time, as anyone else.

435 F.2d at 271. Judge Marovitz's ruling on the motions to dismiss of the defendants who did not consent to the consent decree did make this assumption. *See* note 3 *supra*. Based on these decisions, defendants argue that the plaintiffs must show that their rights have been infringed by coerced precinct work.

The recent Supreme Court and Seventh Circuit case law necessarily implies that proof of coercion is not an essential part of the plaintiffs' case. If independent candidates and voters have a protected constitutional entitlement to freedom from official discrimination against their candidacies and votes on the basis of their political beliefs, that right will be violated by any scheme of patronage employment that uses government jobs to elect government supported candidates. Whether the political precinct work done by the patronage workers is coerced becomes irrelevant for the purpose of proving the violation.[28] The plaintiffs need only show that the government, in sponsoring the patronage system, is purposefully discriminating against them on the basis of their political beliefs, and that the system provides regular Democrats with "an advantage" in elections[29] that they would not otherwise have, *see* pp. 27-32 *supra*; pp. 45-46; note 38 *infra*.

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[28] The question of whether precinct work is coerced will remain relevant in the creation of a remedy. The court would not prevent current patronage employees from continuing to do voluntary, uncompelled precinct work. Similarly, it would not prohibit the defendants from hiring any individual who has done precinct work on their behalf in the past. It would be appropriate, however, to bar the defendants from ever including consideration of an individual's past history of precinct work, or the lack thereof, in any employment decision. *See Illinois State Employees Union v. Lewis*, 473 F.2d 561, 567-68 (7th Cir. 1972) *cert. denied*, 410 U.S. 928, 943 (1973). *Cf. United Public Workers v. Mitchell*, 330 U.S. 76, 96 (1947) (Congress cannot pass law barring Republicans from public jobs). *See also* pp. 43-49 *infra*.

[29] Thus, the Seventh Circuit's determination in *Shakman* that coercion is relevant is not binding on this court as the law of the case. *See* note 6 *supra*.

IV. THE CHALLENGED PATRONAGE PRACTICES INFRINGE UPON THE PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT INTERESTS

The patronage practices challenged in this case infringe upon the plaintiffs' first and fourteenth amendment interests, for the stipulated admissions made by the defendants satisfy the two-part *Bohus* test. The court's decision evaluates the factual matter in the light of two legal standards which govern its organization of the facts.

A. The Legal Standards Applied in Interpreting the Facts

1. The standard for summary judgment

Both sides have attempted to avoid a trial in this case by stipulating to facts which each party hoped would be sufficient for a grant of summary judgment in its favor. The court recognizes that to find for either party on a motion for summary judgment, the court must determine that a high burden of proof has been met.

> The party moving for summary judgment has the burden of clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in his favor. The issue of material fact required to be present need not [, however,] be resolved conclusively in favor of the party asserting its existence, but the movant need only show that sufficient evidence supporting the claimed factual dispute does not require a jury or judge at trial to resolve the parties' differing versions of truth. All inferences to be drawn from the facts contained in the affidavits, exhibits, and depositions are to be drawn in favor of the non-movant. *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 159-61 [(1970)]; *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 303, 305-07 [(1968)]; *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 [(1962)].

Cedillo v. International Association of Bridge Workers, ___ F.2d ___, ___, No. 78-2105, slip opinion at 4-5 (7th Cir. July 6, 1979).[30]

Even though the standard for granting a summary judgment is high, a court must not shrink from granting a summary judgment where it is appropriate.

> With the ever increasing burden upon the judiciary, persuasive reasons exist for the utilization of summary judgment procedure wherever appropriate. Therefore, while appellate courts should not look the other way to ignore the existence of genuine issues of material fact, on the other hand we do not deem it necessary in the best interest of judicial administration to strain to find the existence of such genuine issues where none exist.

Kirk v. Home Indemnity Co., 431 F.2d 554, 560 (7th Cir. 1970).

2. Conspiracy liability

Taken together, the admissions of the defendants, when combined with the uncontroverted affidavits of the plaintiffs, establish that if the patronage practices of the defendants were unconstitutional, the defendants were engaged in a civil conspiracy to commit them. The law of civil conspiracy was recently restated by the Seventh Circuit in *Hampton v. Hanrahan*, 600 F.2d 600, 620-25 (7th Cir. 1979).

> A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or

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[30] The court of appeals continued: "Finally, as a general principle, questions of motive and intent are particularly inappropriate for summary adjudication." *Cedillo*, slip opinion at 5. This is a rare case where a question of motive and intent is conceded by the defendants, making summary adjudication proper.

injury upon another, and an overt act that results in damanges.' "*Rottermund v. United States Steel Corp.*, 479 F.2d 1139 (8th Cir. 1973) (citation omitted). In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; "[c]ircumstancial evidence may provide adequate proof of conspiracy." *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). [600 F.2d at 620-21].

* * *

A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." *Hoffman-LaRoche, Inc., supra*, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. [600 F.2d at 621.]

* * *

. . . [I]n order to have an adequate claim for relief under section 1983, a plaintiff must allege and prove both a conspiracy and an actual deprivation of rights; mere proof of a conspiracy is insufficient to establish a section 1983 claim. [600 F.2d at 622.]

* * *

22 Discrimination on the basis of political beliefs or affiliations has been found to be actionable under section 1985(3). [600 F.2d at 623 n.22.]

The stipulated admissions of the defendants, together with the other evidentiary matter before the court, establishes that there was a conspiracy among the defendants to deprive the plaintiffs of the rights discussed in Part III, pp. 17-37 *supra*. Sheriff Elrod's stipulations indicate the scope of the conspiracy. He admitted that there is a regular practice among the defendants of using public employment for political purposes. As stated on page 4 of his stipulation:

> 8. When elected Sheriff, Mr. Elrod had known of the practice in Chicago, Cook County and the State of Illinois whereby public employment positions with the City government and with other governmental offices in Cook County and the State of Illinois had often been filled on the basis of political recommendation, as discussed below.... Mr. Elrod had also known of the then practice whereby some public employees of the City government and of other governmental offices in Cook County and the State of Illinois who failed to do adequate precinct work or financially to support their ward organizations had been discharged from public employment. Similarly, he had known of a practice in the State of Illinois whereby when a new office holder takes office and is of a different political party or persuasion than his predecessor, many of the employees in the governmental office of the same political affiliation or persuasion as the predecessor are discharged, so that persons may be hired who have been politically recommended by the party of the new office holder. [Footnote omitted.]

The Sheriff's other admissions are typical of those made by all the defendants, although his language is unusually frank. As stated on pages 15-16 of his stipulation:

> 30. Members of the regular Democratic organization generally recommend persons for employment by various governmental offices such as the Sheriff's Office on the basis, among other considerations, of their support or promise of support of the regular Cook County Democratic Organization, of the recommender's ward or township organization or of other units of the Democratic Party and for candidates endorsed thereby. Many such persons are required as a condition of obtaining a recommendation for public employment, to do or to promise to do precinct or other political work for the candidates endorsed by the local regular Democratic Ward Organization or to make or to promise financial contributions to that ward

organization. This is a *practice* of long standing in Cook County. Sheriff Elrod has been aware of these practices since prior to December 7, 1970. [Emphasis added.]

31. Usually no person is recommended by a member of the regular Democratic organization for a public employment position if he or she has in any open way been a worker or partisan of any political group opposed to or by the regular Cook County Democratic Organization and the Central Committee or subunits thereof. On some occasions such persons are so recommended if they agree to switch political affiliation and agree to support the regular Democratic organization and its candidates. Defendant Elrod has also been aware of these practices since prior to December 7, 1970.

32. With regard to applicants for Sheriff's non-merit positions recommended by Central Committee members or other persons active in regular Democratic politics, the political recommendation has frequently been communicated by the recommender to Sheriff Elrod by means of a letter.... In some instances prospective employees for Sheriff's non-merit positions have had the fact of such political recommendation by members of the Central Committee or other important political persons or elected officials in the regular Democratic organization communicated to Sheriff Elrod by a phone call or a personal oral conversation rather than by letter.

The stipulations and admissions of the other consenting and non-consenting defendants are generally similar. They demonstrate that all defendants understand the nature of and participated in this "practice," which can be characterized in technical language as a "common plan."

All of the defendants in question have admitted that they are aware that members of the Democratic Central Committee regularly sponsor applicants for employment to the defendant government officials' agencies. They have also admitted that they are aware that those sponsored are

often required to perform or to promise to perform political work in exchange for appointments to jobs. Finally, the defendants admitted that the officeholders appoint these patronage workers to jobs with the expectation that they will do the precinct work and help elect Democratic candidates. In addition to those admissions, the plaintiff has submitted affidavits that show that it is the policy of the defendants to act together to create and further this patronage system.

The defendants have produced no evidentiary matter to refute the material submitted by the plaintiffs.[31] The court can only conclude, *see* Rule 56(e), Fed. R. Civ. P., that there is no genuine issue as to any material fact concerning the existence of a common plan among the defendants to implement and effectuate the challenged patronage practices, *see Hampton*, 600 F.2d at 621; *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). To the extent that those practices illegally affect the plaintiff's rights, *see* pp. 21-37 *supra*, and pp. 42-50 *infra*, each defendant is a member of a conspiracy violative of 42 U.S.C. §§ 1983, 1985, *see Hampton v. Hanrahan*, 600 F.2d at 622-25, and each is responsible for the acts, *see e.g., Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 576 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Scott v. Moore*, 461 F. Supp. 224, 228 (E.D. Tex. 1978), and admissions, *see e.g., United States v. Trowery*, 542 F.2d 623, 626-27 (3rd Cir. 1976) (dicta) (admissions admissible as evidence against co-conspirator after the court determines that the conspiracy existed at the time of the admission); *cert. denied*, 429 U.S. 1104 (1977), of its co-conspirators, conducted during the pendency of the conspiracy and in

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[31] The absence of additional direct evidence as to meeting dates, particular acts, etc., demonstrating the creation of the conspiracy is not dispositive. Circumstancial evidence may provide adequate proof of the existence of the conspiracy. *Hampton*, 600 F.2d at 621; *Hoffman-Laroche*, 447 F.2d at 872.

furtherance thereof.[32]

The liability of each defendant for all challenged practices is not absolute. In this case, the consenting defendants have renounced, through the consent decree, the use of patronage firing and promotion practices. The plaintiffs have tendered no evidence to suggest that the consenting defendants condone the non-consenting defendants' continued refusal to abjure such practices. Thus, the consenting defendants are not responsible for those practices.

Therefore, in analyzing the constitutionality of the challenged practices, each defendant will be accountable for the hiring practices of all the defendants currently before the court. In addition, the nonconsenting defendants will also be held accountable for their own and each other's patronage firing and promotion practices.

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[32] The conspiracy allegations of Counts IV, V, and VI are broad. Under recently developed Seventh Circuit law, they might have had difficulty withstanding a motion to dismiss. *Compare Sparkmun v. McFarlin*, 601 F.2d 261, 268 (7th Cir. 1979) (en banc) (plurality opinion of Judge Sprecher) (dismissing complaint for insufficiently specific pleading of conspiracy with immune state court judge), *with id.*, at 274-81, (Swygert, J., dissenting) (emphasizing the limited nature of the plurality's holding) (discussing proof of civil conspiracy). Since the factual record before the court contains sufficient uncontroverted evidence to prove the conspiracy, as discussed in the text, and the defendants have not objected to the sufficiency of the pleadings or the court's consideration of the evidence, any inadequacy that may have existed has been waived, *see* Rule 15(b), Fed. R. Civ. P., and the court may proceed to grant summary judgment. *See* 3 Moore's Federal Practice, ¶ 15.13[2] (2d ed. 1979) (collecting cases).

B. The Plaintiffs Have Proved Both Parts of the *Bohus* Test

1. The illegitimate purpose is conceded.

The first part of the *Bohus* test is not even arguable in this case. The defendants have freely admitted that "one of the purposes of giving the preference in hiring" is to "help . . . elect candidates supported by the various members of the Democratic County Central Committee." This necessarily involves a deliberate discrimination against the plaintiff candidates and voters who, as independents, normally oppose the regular Democratic organization candidates. There is therefore no question of material fact as to the existence of "an intentional or purposeful discrimination by authorities in which one class is favored over another." *See* p. 28 *supra.*[33]

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[33] It is not relevant that the defendants do not admit that helping elect regular Democratic candidates is the only purpose for their patronage hiring practices. Under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977), and *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977), a decision is presumed to be improperly motivated once the plaintiffs show that an improper motivation was present. The defendants may rebut that presumption by showing that legitimate purposes support the decision, and that the same decision would have resulted absent the impermissible purpose. *See* Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 Harv. C.R.-C.L.L. Rev. 725 (1977). *See also Finkel v. Branti*, 598 F.2d 609, No. 78-7494 (2d Cir. Feb. 20) (unpublished order) (discussing *Mt. Healthy*), *cert. granted*, ___ U.S. ___, 99 S.Ct. 3095 (1979). The defendants in this case have never claimed that the challenged patronage practices would be carried out in the same way if they did not help elect Democrats. Nothing in the record would support such a claim.

2. The Challenged Patronage Practices Give the Defendants an Advantage in Elections

The court also concludes that there is no genuine issue of material fact concerning the question of whether the challenged patronage practices give the defendants an actual, significant advantage in elections. Based on the stipulated admissions of the parties, the court can only conclude that the plaintiffs have demonstrated the existence of such an advantage.

a. The consenting defendants

The defendant Democratic County Central Committee for Cook County made, *inter alia*, the following admissions with respect to the claims made against each of the consenting defendants:

> [Agency name] gives preference in hiring for many [Agency] jobs to persons who are politically sponsored by Democratic Party Ward or township committeemen or other Democratic regular organization officials. For some of these jobs persons normally can be hired only with Democratic political sponsorship. Most of the jobs for which preference is given are not policy-making or confidential in nature. [Agency] employees often inform Party officials of job openings of which public notice is not otherwise given.
>
> The [Agency] has approximately [number] employees. Over [fraction] of the people hired by the [Agency] in recent years were for jobs for which preference was given to applicants with Democratic Party sponsorship.
>
> . . . .
>
> Usually persons get the sponsorship for a County job from a Democratic party official either after having done or upon the expectation that they will do precinct political work (such as door to door canvassing, putting up posters, etc.) on behalf of candidates for public office endorsed by the sponsor.

> In the City of Chicago there are, on the average, over 250 persons per ward who were sponsored by the Democratic Party officials for state, Cook County, Cook County officer, City of Chicago and other public jobs. There are likewise significant numbers of persons so sponsored for public jobs in the various townships in Cook County. A significant number of these persons in the City and County do political precinct work on behalf of candidates for office supported by sponsoring Democratic Party officials. This political precinct work helps elect candidates supported by the various members of the Democratic County Central Committee. This is one of the purposes of giving the preference in hiring.

Similar admissions are made by the other consenting defendants.

Taking all inferences in favor of the defendant, the next-to-last sentence necessarily shows that the political precinct work done by sponsored patronage workers provides the regular Democratic defendants with an actual, significant advantage in elections.[34] It would go against the plain language of the admission to accept any inference that even though precinct work helps elect regular Democrats, that help is only insubstantial or *de minimus*.[35] The admission is unqualified and unequivo-

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[34] Note that since the patronage employees of any one officeholder are expected to work to support the candidates of the entire regular Democratic ticket, it is the ticketwide effect of the defendant conspirators that must be studied. The fact, for example, that Sheriff Elrod's predecessors in the last two dozen years have included two Republicans and an Independent, *see Elrod*, 427 U.S. at 382 n.5 (Powell, J., dissenting), does not decrease the unconstitutional impact of the Sheriff's office's patronage practices on the entire electoral process of Cook County.

[35] Subsequent to the stipulated admissions made by the defendants, they filed affidavits containing expert testimony denying the existence of any significant advantage. *See* Memorandum of

(Footnote continued on the following page)

cal. The court can only construe it as identifying exactly the type of factor to which the *Weisberg* court referred when it held that the ballot placement practice challenged in that case was "one of a number of factors which tend to affect the outcome of an election, and which may have a substantial effect although the degree varies with the circumstances." *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969).[36]

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35 *(Continued)*

Non-Consenting Defendants in Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 11. These affidavits cannot override the admissions, for the admissions made by the defendants are binding upon them, and the defendants have not sought to withdraw the admissions. Any evidence inconsistent with the stipulated admissions cannot be considered by the court. Rule 36(b), Fed. R. Civ. P.; *see* 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2264.

[36] The results of two campaigns are illustrative. In one, defendant Elrod only won by 10,500 votes in his 1970 race for sheriff against Bernard Carey. That total is smaller than the admitted number of regular Democratic patronage employees in Cook County.

The other campaign is the one which led to this lawsuit. The plaintiff Shakman ran with Al Raby as independents, Odas Nicholson and Attye Belle McGee ran as regular Democrats. The results were:

Raby (I)	14,145
Nicholson (D)	12,330
Shakman (I)	11,707
McGee (D)	9,205

Plaintiff Shakman lost his campaign for election as a delegate to the Constitutional Convention by only 623 votes. Although the exact numbers of patronage workers in the district is not before the court, it is clear that a small number of patronage workers, if they have any effectiveness at all, could help swing this and other close elections. And it is clear that they do have some effectiveness, for the defendants have stipulated that patronage precinct workers "help elect" Democratic candidates.

(Footnote continued on the following page)

The only way that the consenting defendants could avoid summary judgment on this issue would be by showing that the challenged patronage hiring practices are somehow not responsible for the patronage work done by patronage workers. If the precinct work would be done absent the patronage system, or more specifically, if sponsored patronage employees were people who would do precinct political work even if they did not have patronage jobs and had no prospect of or interest in getting them, then it could not be said that the challenged patronage hiring practices provide "an advantage" in elections. Thus, the defendants have made some arguments in the briefs that attempt to raise a genuine issue as to whether a significant number of those patronage workers who do precinct work perform that work voluntarily. They have also submitted excerpts from depositions of several patronage workers, apparently taken in connection with earlier compliance hearings in this case, in which the workers claim that

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36 *(Continued)*

The defendants note that the plaintiff is white while the other three candidates were blacks. They suggest that that may be the most important factor for Mr. Shakman's defeat in this predominantly black district. That argument does not refute Mr. Shakman's point, however. The effect of the defendants' patronage practices may well have been a dispositive factor in the election, that is, a but-for cause of the result, even if it was not the most important factor.

Similarly, it is not important that the regular Democrats do not win all elections in Chicago or Cook County. The Court of Appeals for the Seventh Circuit has interpreted the Constitution and applicable Supreme Court precedent as prohibiting any government action significantly favoring one party or political belief over another unless the action is necessary to further a compelling state interest. As long as the plaintiffs can prove as they have in this case, that the challenged conduct constitutes an advantage that may give the regular Democrats more elections than they would otherwise win, they have made out their claim.

certain precinct work they had performed was done voluntarily.

The court holds that the matter submitted by the defendants is not, however, sufficient to create a genuine issue of material fact. Although the defendants have submitted evidence that indicates that some patronage employees do work on a voluntary basis after they obtain their jobs, they have not submitted evidence in any form that any patronage employee who does political precinct work would voluntarily do the same work even if he did not have, and could never obtain, a patronage job. Since the consenting defendants' responses do not "set forth specific facts showing that there is a genuine issue for trial," summary judgment must be entered against them.[37] Rule 56(e), Fed. R. Civ. P. *See e.g., Faulkner v. Baldwin Piano & Organ Co.*, 561 F.2d 677, 682-83 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).[38]

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[37] The plaintiff has presented enough evidence to warrant summary judgment on this question. The admission that persons usually get sponsorship in exchange for past services or a promise of future services is particularly strong evidence on this point.

[38] The above argument is based on the assumption that it is not necessary for the plaintiff to prove that all of the precinct work done by sponsored employees is coerced. If the court's legal analysis is incorrect, and proof of coerced work is held to be part of the plaintiff's case, the stipulated admissions of the parties may still be sufficient to demonstrate the requisite coercion. The adminissions can be said to prove the following:

1. The challenged patronage hiring practices are massive in scope, and involve a large percentage of the total number of civilian, non-teacher government jobs available in Cook County.
2. Notice of vacancies for the patronage jobs is often available only through regular Democratic committeemen.

(Footnote continued on the following page)

38 *(Continued)*

3. Sponsorship is usually granted in exchange for past political work [and]/or for a promise of future political work. (The court notes that "usually" is defined as "[i]n a usual or wonted manner; according to customary, established or frequent usage; commonly, customary, ordinarily; as a rule. Oxford English Dictionary at 477 [1933 ed.]. *See* The American Heritage Dictionary of the English Language, at 1410.) Though there may be occasional exceptions, sponsorship is customarily, as a rule, conditioned on the performance of precinct work.
4. Precinct work that is so conditioned, as against the background of the evidence in general, and 1 and 2 in particular, is necessarily coerced.
5. The political precinct work of sponsored patronage employees helps win elections.
6. This provides an actual, significant advantage in elections.

The weak point of this argument is that it is conceivable that a substantial number of those patronage employees who received their job in exchange for prior services may subsequently work for the regular Democratic organization "voluntarily" in gratitude for their job or because they like the boss and the candidates he supports. (The services of those who received their job in exchange for future political services is presumptively coerced, even though the consent decree in this case makes their promise unenforceable.) The number of such "voluntary" workers might be so substantial that the court could not say that the "advantage" received by regular Democrats because of the precinct work was a direct result of the coerced precinct work. As noted in the text, certain deposition excerpts were proffered to support such a claim, although the excerpts do not indicate the consideration for which the deponents received their job.

Summary judgment might still be appropriate, however. The admission made by the defendants only focuses on the post-employment precinct work of these employees. A considerable amount of pre-employment work must continually and necessarily be performed by prospective applicants who will use that work

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b. The non-consenting defendants

Since the court holds that there is no genuine issue of material fact between the plaintiffs and the consenting defendants, it must hold, a *fortiori*, that there is no genuine issue of material fact between the plaintiffs and the non-consenting defendants. The non-consenting defendants, as members of the same conspiracy as the consenting defendants, are responsible for the acts and admissions of the consenting defendants that were taken within the scope of the conspiracy and in furtherance thereof. *See* pp. 41-42 *supra*. That alone is sufficient to justify a finding that the non-consenting defendants have not raised a genuine issue of material fact as to whether their practices, when combined with those of the consenting defendants, infringe upon the plaintiffs' protected first and fourteenth amendment rights.

In addition, the non-consenting defendants are responsible for the effects upon the electoral process of their own patronage promotion and firing practices. There can be no doubt that these practices are far more coercive upon current employees than are the consenting defendants' patron-

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38 *(Continued)*
to obtain government jobs. The admissions of the defendants logically compel that this work, too, be considered in determining whether enough of the precinct work that "helps elect" regular Democrats is coerced work, for purposes of granting summary judgment.

It is possible that a court might decide that the resolution of this issue could only be done by a trial on the merits, at which general testimony on the scope and effect of coerced patronage work would be taken, as limited by the stipulations. On the other hand, a court might well conclude, as this court does, that no genuine issue of material fact really exists here, and that a court that refuses to grant summary judgment to the plaintiffs is straining hard to avoid it. *See* p. 38 *supra*.

age hiring practices, and they are far more likely than the hiring practices to cause current employees to do precinct political work.[39] The additional effect of this coerced

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[39] The court sees no point in conducting a detailed explication of the evidence concerning the non-consenting defendants' firing and promotion practices. Much of the evidence is summarized in the unpublished Supplemental Findings of Fact issued today. The following stipulated admissions, however, are of particular interest to the court because they, when read together, highlight some of the evidence regarding those practices.

> 29. No employee of the Park District hired for full-time work under a temporary appointment and whose work at the Park District has been deemed satisfactory has been discharged in the last three years because of the expiration of the temporary appointment. Persons hired by the Park District under temporary appointments frequently remain for extended periods of time as "temporary appointments." Persons who are performing satisfactory work, have satisfactory efficiency ratings and who are not discharged for other reasons and who do not obtain civil service status, are reappointed as temporary appointments. From time to time persons hired under temporary appointments pass civil service examinations and thus secure protected civil service status. By virtue of actual job experience gained as an employee of the Park District under a temporary appointment, persons obtain an advantage on civil service examinations over persons not so employed.
>
> 30. Many promotions in full-time (other than summer) employment are into temporary appointment positions.... Preference is given, in many instances, in promotions under temporary appointments in positions which are not policy-making or confidential in nature to persons with political sponsorship as described above, but such preference is only given to employees who the Park District finds to be fit and qualified for the position to which the promotion is being made.
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> ....

(Footnote continued on the following page)

39 *(Continued)*

32. The Superintendent and the Personnel Director from time to time receive telephone calls or other communications from Central Committee members asking that Park District employees be fired because of their failure to do satisfactory political precinct work, but the Park District's position is that the Superintendent has not, in fact, done so.

33. In response to requests of the kind referred to in Paragraph 30 above, the Park District from time to time transfers the employee to employment out of the ward of the sponsor if, in the judgment of the Superintendent and the immediate Supervisor of the employee, it is in the best interest of the Park District.

34. From time to time the Superintendent and the Personnel Director receive telephone calls or other oral communications from Central Committee members asking that Park District employees who are having employment difficulties with the Park District not be discharged, sometimes citing their good political standing. In some instances, consideration is given to these communcations in giving these employees an opportunity to improve their work performance rather than being immediately discharged.

35. It is believed that the Park District on occasion, in the past, discharged employees upon the recommendation of the employee's political sponsor, usually because of a failure to do adequate political precinct work. It is the position of the Park District that since Mr. Kelly became its General Superintendent, the Park District has not followed such a practice of discharging employees. Mr. Kelly has no personal knowledge of such a practice while he has been employed by the Park District.

36. The Park District maintains a list of its employees by Parks, and it maintains records of the parks in each ward. The records of the Park District thus reflect the ward of residence of Park District employees. These records on occasion are used to respond to requests from Central Committee members for additional jobs for politically worthy persons from the ward.

. . . .

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precinct work, when added to the effect of the work produced by the patronage hiring practices of the consenting defendants, creates an even greater infringement on the plaintiffs' right to an electoral process that is not tainted by deliberate discrimination against their political efforts.

The non-consenting defendants claim that even though at one point they may have been liable for their patronage firing practices, they should not now be held responsible for them. This claim is based on two separate arguments. First, the defendants say that they have not conducted any patronage firings in recent years. Second, they argue that since the Supreme Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), has effectively outlawed patronage firing practices, this court need not rule on those practices.

Both arguments are insufficient. As to the first, the defendants have never renounced, with legal sufficiency, the use of their patronage firing powers. Absent such a renunciation, the plaintiffs' claim on this ground is not mooted.

> It is established doctrine that the voluntary cessation of the complained action is not sufficient to moot litigation. It must appear with assurance "that 'there is no reasonable expectation that the wrong will be repeated,'" [citation omitted]. The defendants have the "heavy burden of persuasion." (citation omitted).

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39 *(Continued)*

> 38. One of the reasons for giving preference in hiring, as stated above, is to assist in providing regular Democratic political precinct organizations.

Stipulations of Fact Between Plaintiffs and Defendant, Chicago Park District, at 11-14. Certain of defendant Elrod's stipulations are quoted at pp. 39-40 *supra*.

Hernandez v. Finley, 471 F. Supp. 516, 521 (N.D. Ill. 1978) (three-judge court) (quoting *Rabinowitz v. Board of College District No. 508*, 507 F.2d 1255, 1256 [7th Cir. 1974]).

As to the second argument, the plaintiffs' claim against the defendants' firing practices is legally distinct from the claim brought by the fired patronage employee in *Elrod v. Burns*. *See* pp. 14-17 *supra*. The non-consenting defendants have cited no cases that would suggest that the plaintiffs here are not entitled to a legal determination of their own claim, so that they may obtain direct enforcement from this court of any violation of their own rights that may occur.

The court therefore holds that the non-consenting defendants have independently infringed the plaintiffs' constitutional rights through their use of patronage hiring, firing, and promotion practices, as well as through their conspiracy with the consenting defendants to practice and further patronage hiring practices.[40]

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[40] In its analysis in sections a and b, pp. 43-50 *supra*, the court has evaluated the factual record to determine whether it leaves no genuine issues of material fact as against the legal standard set by the *Bohus* test. The court could also conduct a second analysis performing a detailed review of the evidence under the "traditional" first and fourteenth amendment legal approach, *see* pp. 21-27 *supra*. The court has not considered the second factual analysis to be necessary, since it should be apparent from the factual discussion conducted in connection with the *Bohus* test that the defendants' challenged practices substantially infringe the plaintiffs' rights of political expression, association, and equal participation of voters in the electoral process. Under either approach, the facts justify the application of the scrict scrutiny test to the patronage practices.

V. NO COMPELLING GOVERNMENT INTERESTS IS NECESSARILY FURTHERED BY THE CHALLENGED PATRONAGE PRACTICES

A. The Legal Standard

Whether analyzed under the first or the fourteenth amendment, the challenged patronage practices must survive exacting scrutiny. Under the first amendment, significant government interferences with the freedom of speech, political belief, expression, or association, must survive exacting scrutiny. *Abood v. Detroit Board of Education*, 431 U.S. 209, 259-60 (1977) (Powell, J., concurring in the judgment); *Elrod v. Burns*, 424 U.S. 347, 362-63 (1976) (plurality opinion); *id.*, at 381 (Powell, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1975). This is true whether the challenged action directly restricts first amendment freedoms or places indirect burdens on their exercise, so long as the government provides some inducement for their abandonment. *Elrod*, 427 U.S. at 356-61 (plurality opinion); *see Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). Such interferences cannot be justified by a mere showing of a rational relation to a legitimate government objective. *Elrod*, 427 U.S. at 362 (plurality opinion) *id.*, at 381 (Powell, J., dissenting); *Buckley*, 424 U.S. at 64; *Rhode Island Minority Caucus v. Baronian*, 590 F.2d 372, 376 (1st Cir. 1979). Instead, the government must carry the burden of showing that the challenged action furthers a vital public interest. *Abood*, 431 U.S. at 259-60 (Powell, J., concurring in the judgment); *Elrod*, 427 U.S. at 362 (plurality opinion); *Bates v. Little Rock*, 361 U.S. 516, 524 (1956). In addition, it must appear that the benefit of the action in terms of service to an important public interest outweighs the detriment to protected freedoms. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 560-67 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947); *see Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 300 (5th Cir. 1977) (en banc) (dis-

cussing first amendment balancing test in this context), *cert. denied*, 435 U.S. 1013 (1978). Finally, the challenged government action must be closely tailored to the service of its legitimate objectives, so as not to unnecessarily restrict constitutionally protected interests. *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963).[41]

The fourteenth amendment analytical framework is similar. Government decisions which are based on impermissible classifications are subject to the strictest scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 18-29 (1973). Such classifications must reflect a compelling government interest, and be closely tailored so that no less drastic means is available towards meeting those interests. *See Illinois State Board of Elections v. Socialist Workers Party*, ___ U.S. ___, ___, 99 S.Ct. 983, 991 (1979) (collecting cases).

Viewed under either first or fourteenth amendment analysis, the patronage practices challenged by the plaintiffs cannot withstand constitutional scrutiny. Indeed, the defendants have failed to put into issue sufficient facts to properly raise these interests. Even if they had, the interests raised are insufficient to justify the infringements of the plaintiffs' rights that the court has found in this case.

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[41] It is an interesting question whether the possibly unconstitutional effects of the defendants' patronage practices on employees' and applicants' own rights can be considered by a court in the first amendment "balance," even though the plaintiffs cannot raise such violations for purposes of determining liability, *see* pp. 14-17 *supra*. The court has not considered those effects in this case.

B. The Defendants Have Not Properly Raised the Existence of Any Compelling State Interests

The defendants have totally failed to meet their burden of showing that compelling state interests justify the patronage practices. They have not properly placed before the court the existence of such interests.

Under Rule 56(e), Fed. R. Civ. P., it is the obligation of a party opposing a motion for summary judgment to go beyond the pleadings and the briefs to show the existence of a genuine issue of material fact. "[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Affidavits containing only conclusory allegations of ultimate facts or legal conclusions do not set forth the specific facts required by the rule. *See Askew v. Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976); *Ashwell Co. v. Transamerica Insurance Co.*, 407 F.2d 762, 766 (7th Cir. 1969).

The only evidence in this case cited by the defendants as proof of the alleged state interests is the affidavit of John H. Stroger, Jr., who, as of May 11, 1978, the date of the affidavit, had been a member of the Board of County Commissioners for seven years and Democratic Ward Committeeman of the Eighth Ward for ten years. The operative portion of the affidavit is as follows:

> I am making this affidavit to state my belief in the constructive ends served by the limited patronage employment in Chicago and Cook County, as follows:
>
> a. It tends to recruit a work force with an equitable distribution of jobs geographically.
>
> b. It insures an equitable distribution so far as minorities and various ethnic groups are concerned.
>
> c. It enables an officeholder in filling vacancies

to recruit persons sympathetic with his philosophy of the management of government and public service.

d. It serves as a leaven of interested and ambitious persons in a work force otherwise recruited by "Civil Service methods." (Compare, President Carter's complaints of an obdurate Civil Service bureaucracy.)

e. It offers an opportunity to recruit handicapped persons into the work force. Their employment is a matter of public concern.

f. It recruits persons who increase the productivity of the work force because of their ambition to advance.

g. It offers a training ground for persons interested in a career in local government.

h. It furnishes an opportunity to persons from areas disadvantaged, both economically and socially, to rise to positions of influence, where they can be of real service, not only to their community, but to their city, county, state and country as a whole. If the federal court were to enjoin all patronage hiring in Chicago and Cook County, it would be denying now to Blacks and Hispanics the opportunity historically enjoyed by other ethnic groups, at this time in history, when Blacks and Hispanics are becoming the dominant voting power because of their numbers in urban America.

i. It tends to give officeholders representatives throughout the communities of the city and county. This can be an important matter at all times, but particularly in time of crisis. For example, during the riots of the late 1960's, precinct leaders with their intimate association with their neighbors were perhaps the main influence for stabilizing things and bringing them back to normal.

These allegations are completely conclusory. With the possible exception of the last one, they are totally devoid of any specific facts that would support the contentions involved. The court finds that they are insufficient to raise

a genuine issue of material fact pursuant to Rule 56(e). They are especially inadequate in light of the heightened burden on the government in this case. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 259 (Powell, J., concurring in the judgment) ("'the [governmental interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest....'") (quoting *Elrod*, 427 U.S. at 362 [plurality opinion]).

C. Even If They Are Properly Raised, the Practices Advanced by the Defendants Are Not Sufficient to Justify the Challenged Patronage Practices

Even if the interests raised by the defendants in the Stroger affidavit, along with certain other interests discussed in their briefs, may be considered by the court, those interests are insufficient to withstand the strict constitutional scrutiny that must be applied. The court will consider the interests raised by the defendants and demonstrate how each interest is insufficient.

Goals, a, b, e, g, and h of the Stroger affidavit all involve the problem of recruiting particular groups or persons into government service. There is no reason, however, that such recruitment could not be conducted within a civil service system. Extra weight in employment or termination decisions could be given to the factors involved in a, b, e, g, and h. Even without civil service protection, these goals could be attained in a non-merit system that did not give preferences to those with political sponsorship. The words of Mr. Justice Stevens, sitting as Circuit Judge in *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972) *cert. denied*, 410 U.S. 928, 943 (1973), illustrate this point.

> Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified posi-

> tions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.
>
> However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination [or refusal to promote or hire]... There is a clear distinction between the grant of tenure to an employee – a right which cannot be conferred by judicial fiat–and the prohibition of a discharge [or refusal to hire or promote] for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in *Perry v. Sindermann*, 408 U.S. 593 (1972).
>
> Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge [or a refusal to hire or promote] is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review.

473 F.2d at 567-68. Since there are less drastic means available to meet these proposed goals, they are not sufficient to justify the patronage practices. *See Illinois State Board of Elections v. Socialist Workers Party*, U.S. ___, 99 S.Ct. 983, 991 (1979); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Goals d and f are similar to those discussed above. They are aimed at recruiting certain persons, but they are also aimed at using non-merit appointments to correct certain perceived flaws with the civil service system. Once again, though, there is no reason that these goals could not

be served by a non-merit system that did not take political work or affiliation into account. Thus, less drastic means are available to meet these goals.

Goal i can also be met through less drastic means. If the desire is to have government employees living in every geographical area, as in goal a, recruitment can be based in part on geographic considerations without involving political considerations. On the other hand, if the goal is to have a political representative of officeholders in each neighborhood, there is no reason why the defendants could not build up a network of contacts in neighborhoods, perhaps including their precinct captains, to serve that function. Both networks, governmental and political, could exist simultaneously. In addition, there has been no showing that the continuance of the patronage system is necessary to the achievement of this interest.[42]

The last of the goals discussed in the Stroger affidavit is c, enabling an officeholder in filling vacancies to recruit persons sympathetic with his philosophy of the management of government and public service. This goal is closely related to the goals discussed by the defendants in their briefs. In the Memorandum of Non-Consenting Defendants in Opposition to the Plaintiffs' Motion for Partial Summary Judgment at 24, and in the brief in support of their counter-motion for summary judgment at 30-32, the non-consenting defendants raise the governmental interests that were considered and rejected by the Supreme Court in the *Elrod* case. These interests, as discussed in the plurality opinion, include the absence of any right to government employment, the need to ensure effective government and the efficiency of public employees, the increased account-

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[42] The court notes that many of the interests discussed above are not sufficiently compelling to justify the challenged patronage practices, even if the defendants could show that the practices were a necessary means towards achieving those goals.

ability to the public of patronage employees, the need for political loyalty of employees in order to assure that representative government is not undercut by obstructionist tactics, and the preservation of the democratic process. 427 U.S. at 360-72.[43]

The court holds that the *Elrod* plurality opinion, insofar as it rejected these asserted interests as a defense for patronage firings, is in accord with the law of this circuit, and is directly and equally applicable to patronage hiring and promotional practices. Then-Judge Stevens' opinion for the Seventh Circuit in *Illinois State Employees Union v. Lewis*,[44] 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973), establishes that the Elrod defenses are insufficient.[45]

In his opinion, Justice Stevens rejected the goals raised by the defendants. Justice Stevens directly rejected the first goal raised by the defendants, the absence of a right to public employment. 473 F.2d at 573-74. Then, under a slightly different framework, he rejected the others.

Absent some proof that political loyalty was particularly important for specific classes of workers, Justice

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[43] Many of the arguments made by the defendants confuse the best interests of the government and the best interest of the Democratic party. "[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Abood*, 431 U.S. at 260 (Powell, J., concurring in the judgment) (quoting *Elrod* 427 U.S. at 362 [plurality opinion]).

[44] "The holding of Shakman is in complete accord with our decision here." *Lewis*, 473 F.2d at 569 n.17.

[45] *Lewis* has been repeatedly relied on in subsequent Seventh Circuit cases, see, *e.g.*, *Newcomb v. Brennan*, 558 F.2d 825, 827, 830 (7th Cir.) *cert. denied*, 434 U.S. 968 (1977); *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 495 n.16 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); and was specifically reaffirmed in *Burns v. Elrod*, 509 F.2d 1133, 1135 (7th Cir. 1975), *aff'd*, 427 U.S. 347 (1976).

Stevens held, general defenses based on a need for political loyalty were insufficient to withstand constitutional scrutiny.[46] 473 F.2d at 574. Finally, Justice Stevens rejected defenses based on a claim that interests of government efficiency and preserving the democratic process support patronage practices. 473 F.2d at 574-76. He concluded that:

> reflection persuades us that in the long run the State's strong interest in efficient management is at least consistent with, and may well favor, the recognition and protection of the constitutional rights asserted in this case.
>
> Of greater significance is the fact that as the number of employees affected is increased, the importance of preserving their First Amendment freedoms likewise grows. Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.

473 F.2d at 575-76.

Although the factors to be weighed in a strict scrutiny analysis may differ slightly in this case from those pre-

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[46] It is the court's understanding that the plaintiffs are not challenging the defendants' use of political considerations in their employment decisions concerning policymaking officials, *see Elrod v. Burns*, 427 U.S. 347 (1976), *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). The court's decision today does not affect government employees who are in that category.

sent in *Elrod* and *Lewis*, the court holds that the result must be the same. The defendants' interests asserted in all cases are effectively the same, and the question of the presence of any less drastic means to achieve the government's interests must be determined identically. The only possible difference concerning the application of the test in this case as compared to its application in *Elrod* and *Lewis* is the importance of the plaintiffs' interests infringed by the patronage practices.

This court will not attempt to determine whether the rights of candidates and voters at issue here are either more or less important than the right of government employees to retain their jobs without regard to their political affiliations. Both are clearly important constitutional interests, and the result of the strict scrutiny test must be the same. The challenged patronage practices are unconstitutional.

XII. CONCLUSION

Ever since the Court of Appeals for the Seventh Circuit issued its opinion in this case nine years ago, the parties have attempted, for the most part, to work out their differences. The plaintiffs entered into a consent decree with most of the defendants in this case. They negotiated stipulated factual admissions with the defendants currently before the court. The plaintiffs, the consenting Democratic defendants, and the non-consenting Democratic defendants then filed cross-motions for summary judgment. This was done because both sides recognized an interest in avoiding a trial in this case.

A trial in this case would be lengthy and difficult. It would probably involve taking the testimony of most of the defendants in this case, who hold important official positions. It would be disruptive of the ongoing conduct of the business of many government institutions in this area. Also, a trial would be very expensive, and involve the consumption of a great amount of public funds, and of

the resources of the individual parties.[47]

Thus, the parties, in an admirable spirit of conciliation, have endeavored to put this case in a position where the court could resolve it without the necessity of a public trial.[48] The court has found that under Rule 56 of the Federal Rules of Civil Procedure, which governs the granting of a summary judgment, it is able to deny the defendants' motions for summary judgment on counts I, II, IV, and V of the amended complaint, and to grant the plaintiffs' motions for partial summary judgment on the issue of liability on those counts as to these defendants.[49]

The court holds that the plaintiffs have a right to an electoral process free from deliberate governmental discrimination against their views. The factual record before the court conclusively demonstrates, beyond any existence of a genuine issue of material fact, that the defendants deliberately use the challenged patronage practices to help elect regular Democrats and help defeat their opponents. This purposeful, deliberate discrimination gives the defendants an actual, significant advantage in elections.

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[47] The court notes, however, that a trial of the issues in this case would have general educational value. Under the spirit of the first amendment, it would be beneficial to the public for it to recieve a full and detailed demonstration of how the electoral and public employment processes actually work in Cook County. It is not the court's role to determine whether these benefits would outweigh the burdens that a trial would entail. That is a decision that must be made by the parties, consistent with the applicable law and the Federal Rules of Civil Procedure.

[48] The court fully recognizes that a trial cannot be avoided merely because both sides have filed motions for summary judgment. 6 Moore's Federal Practice ¶ 56.13, at 56-341 (2d ed. 1976) (collecting cases).

[49] The plaintiffs' motions for summary judgment on counts III and VI of the amended complaint are denied, and the defendants' motions for summary judgment on these courts are granted. *See* note 1 *supra*.

This is not to say, of course, that patronage workers are the dominant force in every election. The plaintiffs do not claim that they are. The parties agree that many factors, including campaign money, television exposure, racial or ethnic background, etc., may influence the outcome of the election. The point is that patronage workers given an important advantage to regular Democrats. The regular Democratic defendants are using the government to further their own political interests by giving preferences for many government jobs only to those who have worked and/or will promise to work for regular Democratic candidates.

The court concludes that the patronage practices challenged by the plaintiffs infringe their rights as candidates and voters under the first and fourteenth amendments to the Constitution of the United States and 42 U.S.C. § § 1983, 1985. The challenged practices are not necessary to the furthering of any compelling government interest. Accordingly, the court holds that the challenged practices violate the constitution of the United States.

The court hereby sets a status hearing for Friday, October 12, 1979, at 10:00 a.m. All parties are invited to attend. At that time, the court will entertain suggestions as to the manner in which it should proceed in order to determine the proper remedy in this case.[50] The court trusts that the parties will work together in the creation of the remedy, as they have worked together in the previous

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[50] *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 Colum. L. Rev. 739 (1978); Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978); *Special Project–The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 783 (1978). *See also* O. Fiss, The Civil Rights Injunction, (1978); note 28 *supra*.

phases of this litigation.[51]

IT IS SO ORDERED.

DATED: September 24, 1979

NICHOLAS J. BUA, JUDGE
United States District Court

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[51] The court will also entertain suggestions, if necessary, as to the propriety and advisability of certifying this interlocutory summary judgment order for immediate appeal pursuant to 28 U.S.C. § 1292(b). *See* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2715.

APPENDIX

CONSENT JUDGMENT ENTERED MAY 5, 1972

In The United States District Court

Northern District of Illinois

Eastern Division

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al., *Plaintiffs,* *vs.* THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, etc., . . . the REPUBLICAN COUNTY CENTRAL COMMITTEE OF COOK COUNTY et al., *Defendants.*	No. 69 C 2145

JUDGMENT

Plaintiffs Michael L. Shakman and Paul M. Lurie having filed their complaint herein, and said plaintiffs (on behalf of themselves and the classes they represent under the First Amended Complaint herein as determined by previous Orders of Court) and the defendants named in paragraph C hereof having consented to the entry of this Judgment as to such parties without trial and without adjudication of any allegation in the complaint or any issue of fact with respect to the alleged commission by said defendants of any unconstitutional, unlawful or wrongful act, and without this Judgment constituting evidence of or an admission by any defendant with respect to any issue

of fact herein or the commission of any unconstitutional, unlawful or wrongful act;

Now, therefore, upon the consent the parties as aforesaid, it is hereby Ordered, Adjudged and Decreed as follows:

A. This Court has jurisdiction of the parties to this Judgment and of the subject matter of this action under Sections 1331 and 1343(3) of Title 28 of the United States Code.

B. As used herein, (1) the term "governmental employment" means any employment (whether full-time or part-time, permanent or temporary, and regardless of whether the employment is paid for by federal funds) by or for the City of Chicago or any employment within the Northern District of Illinois by or for any other governmental entity other than an entity of the federal government; (2) the terms "governmental employee" and "employee" mean a person employed in governmental employment.

C. The provisions of this Judgment apply to each and all of the following: (1) defendant The Democratic Organization of Cook County, a corporation; (2) defendant Democratic County Central Committee of Cook County and all members thereof; (3) defendant city of Chicago, a municipal corporation; (4) defendant Richard J. Daley, individually and as President of the Democratic Organization of Cook County, Chairman of the Democratic County Central Committee of Cook County, Mayor of the City of Chicago and Democratic Party Ward Committeeman for the Eleventh Ward of the City of Chicago; (5) defendant Matthew Bieszczat, individually and as Secretary of The Democratic Organization of Cook County, Secretary of the Democratic County Central Committee of Cook County, member of the Board of County Commissioners of Cook County and Democratic Party Ward Committeeman for the TwentySixth Ward of the City of Chicago; (6) defendant

Marshall Korshak, individually and as Democratic Party Ward Committeeman for the Fifth Ward of the City of Chicago; (7) defendant George W. Dunne, individually and as President of the Board of County Commissioners of Cook County and as Democratic Party Ward Committeeman for the Forty-Second Ward of the City of Chicago; (8) defendant P. J. Cullerton, individually and as County Assessor of Cook County and as Democratic Party Ward Committeeman for the Thirty-Eighth Ward of the City of Chicago; (9) defendant Edward J. Barrett, individually and as County Clerk of Cook County and as former Democratic Party Ward Committeeman for the Forty-Fourth Ward of the City of Chicago; (10) defendant Matthew J. Danaher, individually and as Clerk of the Circuit Court of Cook County; (11) defendant Richard B. Ogilvie, individually and as Governor of the State of Illinois; (12) defendant Edmund J. Kucharski, individually and as Chairman of the Republican County Central Committee of Cook County; (13) defendant William J. Scott, individually and as Attorney General of the State of Illinois; (14) defendant John W. Lewis, individually and as acting Secretary of State of Illinois; (15) defendant Paul Simon, individually and as Lieutenant Governor of the State of Illinois; (16) defendant Alan Dixon, individually and as Treasurer of the State of Illinois; (17) defendant Michael Bakalis, individually and as Superintendent of Public Instruction of the State of Illinois; (18) defendant Metropolitan Sanitary District of Greater Chicago, a municipal corporation; (19) defendant John E. Egan, individually and as President of the Metropolitan Sanitary District of Greater Chicago; (20) defendant Joseph C. Doring, individually and as Sheriff of Kane County, Illinois; (21) defendant William A. Vollrath, individually and as County Clerk of Kane County, Illinois; (22) defendant Jack M. Weidner, individually and as Coroner of Kane County, Illinois; (23) defendant James H. Fitzgerald, individually and as Treasurer of Kane County, Illinois; (24) defendant Jan E. Carlson,

individually and as Clerk of the Illinois Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois; (25) defendant James A. Callahan, individually and as Sheriff of LaSalle County, Illinois; (26) defendant George L. Hunter, individually as [sic] as County Clerk of LaSalle County, Illinois; (27) defendant Ray Rathbun, individually and as Treasurer of LaSalle County, Illinois; (28) defendant Republican State Central Committee of Illinois and all members thereof; (29) defendant Victor L. Smith, individually and as Chairman of the Republican State Central Committee of Illinois; (30) defendant William F. Scannell, individually and as Secretary of the Republican State Central Committee of Illinois; (31) defendant Timothy Sheehan, individually and as Republican Committeeman for the Forty-First Ward of the City of Chicago; (32) defendant Joseph Woods, individually and as a Commissioner of Cook County; (33) defendant Floyd Fulle, individually, as a Commissioner of Cook County and as Republican Committeeman for Maine Township; (34) defendant Charles J. Grupp, individually, as a Commissioner of Cook County and as Republican Committeeman for Bloom Township; (35) defendant William N. Erickson, individually, as a Commissioner of Cook County and as Republican Committeeman for Evanston Township; (36) defendant Eugene Leonard, individually, as Bremen Township Assessor and as Republican Committeeman for Bremen Township; (37) defendant William E. Kane, individually, as Orland Township Assessor and as Republican Committeeman for Orland Township; (38) defendant John J. Nimrod, individually, as Niles Township Supervisor and as Republican Committeeman for Niles Township; (39) defendant Bernard Pederson, individually, as Palatine Township Assessor and Republican Committeeman for Palatine Township; (40) defendant John F. Kimbark, individually, as Clerk of both the Town of Cicero and Cicero Township and as Republican Committeeman for Cicero Township; (41) defendant Elmer N. Conti, individually, as President

of the Village of Elmwood Park and as Republican Committeeman for Leyden Township; (42) defendant Frank A. Bella, individually, as Calumet Township Collector and as Republican Committeeman for Calumet Township; (43) the successors of each of the foregoing defendants in each of their aforesaid capacities; and to (44) the present and future officers, members, agents, servants, employees and attorneys of each of the defendants and others named or referred to hereinabove, and all others in active concert or participation with any of the defendants or others named or referred to in (1) through (44) above who receive actual notice of this Judgment by personal service or otherwise.

D. It is declared that compulsory or coerced political financial contributions by any governmental employee, contractor or supplier, to any individual or organization and all compulsory or coerced political activity by any governmental employee are prohibited, and, once hired, a governmental employee is free from all compulsory political requirements in connection with his employment. However, governmental employees may engage on a voluntary basis, on their own time, in any lawful political activity (including the making of political financial contributions).

E. Each and all of the defendants and others named or referred to in Paragraph C above are permanently enjoined from directly or indirectly, in whole or in part:

(1) conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor.

(2) knowingly causing or permitting any employee to do any partisan political work during the regular working hours of his or her governmental employment, or during time paid for by public funds; provided that nothing contained in this subparagraph (2) shall prohibit governmental employees

from voluntarily using vacation time, personal leave time or from taking nonpaid leaves of absence to do political work, but permission to do so must be granted nondiscriminatorily.

(3) knowingly inducing, aiding, abetting, participating in, cooperating with or encouraging the commission of any act which is proscribed by this paragraph E, or threatening to commit any such act.

F. Each defendant named or referred to in paragraph C above shall give notice of this Judgment, in the manner directed by this Court, to the employees under said defendant's jurisdiction.

G. This Judgment represents the agreed-to disposition of the claims asserted in this case by plaintiffs Michael L. Shakman and Paul M. Lurie, on behalf of themselves and the classes referred to above, against the defendants named in paragraph C above. Plaintiffs' claims for money damages, compensatory and exemplary, against the defendants named in paragraph C above are hereby dismissed.

H. Jurisdiction is retained for the following purposes:

(1) To enable the parties to this Judgment to continue to litigate the following questions before this Court:

(a) Certain governmental employment positions under the jurisdiction of the defendants who are parties to this Judgment by their nature involve policymaking to such a degree or are so confidential in nature as to require that discharge from such positions be exempt from inquiry under this Judgment. Jurisdiction is maintained to litigate the question of which governmental employment positions under such defendants' jurisdiction are so exempt for the foregoing reasons.

(b) Can political sponsorship or other political considerations be taken into account in hiring employees? If so, to what extent can such considerations be taken into account?

(c) What remedies and implementing procedures ought to be granted and established by the court in connection with the resolution of the questions raised in the foregoing subparagraph (a) and (b)?

(2) To enable the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the enforcement of compliance with the provisions contained herein, and for the punishment of the violation of any of such provisions. Application to enforce such provisions or to impose punishment for any such violation may be presented to this Court by any registered voter. Prior written notice of all such applications and other matters in this action shall be given to the named parties hereto. Except where emergency relief is sought, 7 days written notice shall be given.

I. The Court expressly finds and determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay and directs that this Judgment be entered forthwith.

ENTER:

/s/ Abraham L. Marovitz
District Judge

Dated: 5/5/72, 1972.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,

Plaintiffs,

vs.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY; DEMOCRATIC COUNTY CENTRAL COMMITTEE OF COOK COUNTY and all its members; GEORGE W. DUNNE, individually and as President of the Board of County Commissioners of Cook County, as President of the Board of Commissioners of the Forest Preserve District of Cook County, and as Chairman of the Democratic County Central Committee of Cook County; CITY OF CHICAGO, a municipal corporation; JANE R. BYRNE, Mayor of the City of Chicago; MORGAN M. FINLEY, individually and as Clerk of the Circuit Court of Cook County; EDWARD J. ROSEWELL, individually and as Treasurer of Cook County; STANLEY J. KUSPER, JR., individually and as Clerk of Cook County; THOMAS C. HYNES, individually and as Assessor of Cook County, FOREST PRESERVE DISTRICT OF COOK COUNTY, a municipal corporation; RICHARD J. ELROD, individually and as Sheriff of Cook County; The CHICAGO PARK DISTRICT, a municipal corporation, et al.,

Defendants.

No. 69 C 2145

Before Honorable
Nicholas J. Bua, Judge
United States District Court

September 24, 1979

SUPPLEMENTAL FINDINGS OF FACT

The following findings of fact are issued by the court as a supplement to its opinion granting the plaintiffs' motion for partial summary judgment. Summary Judgment is granted in part as to the following defendants:

City of Chicago;
Jane R. Byrne, individually and as Mayor of the City of Chicago;
Forest Preserve District of Cook County, Illinois;
Morgan M. Finley, individually and as Clerk of the Circuit Court of Cook County, Illinois;
Edward J. Rosewell, individually and as Treasurer of Cook County, Illinois;
Stanley J. Kusper, Jr., individually and as Clerk of Cook County, Illinois;
Thomas C. Hynes, individually and as Assessor of Cook County, Illinois;
George W. Dunne, individually, as President of the Board of Commissioners of Cook County, Illinois, as President of the Board of Commissioners of the Forest Preserve District of Cook County, Illinois, and as Chairman of the Democratic Party County Central Committee for Cook County, Illinois;
Democratic Party County Central Committee for Cook County and its members;
Chicago Park District;
Richard J. Elrod, individually and as Sheriff of Cook County, Illinois.

The Court finds that there is no genuine issue of any material fact as to any matter contained herein.

Findings of Fact

1. Plaintiffs Michael L. Shakman and Paul M. Lurie filed their partially verified First Amended Complaint on October 14, 1971.

2. By its Order of October 14, 1971, the Court allowed Counts I through VI of the Complaint (which

became Counts I through VI of the First Amended Complaint) to be maintained upon behalf of the following described classes.

> 1. All independent candidates (meaning candidates who are not the candidates of a political party or, in the case of party primary elections or so-called nonpartisan elections, are not the candidates of the "regular" organization of a political party) in all elections held in whole or in part within Cook County, Illinois, at which candidates for any federal, state, county, city or other public office are or were elected or nominated subsequent to October 19, 1969 (the date this suit was commenced), including all elections held subsequent to the date hereof. (Counts I and IV)
>
> 2. All independent voters (meaning voters who vote for or otherwise support independent candidates) in Cook County on October 19, 1969 and subsequent thereto, including subsequent to the date hereof. (Counts II and V)
>
> 3. All taxpayers in Cook County on October 19, 1969 and subsequent thereto, including subsequent to the date hereof. (Counts III and IV)

3. In 1969, Mr. Shakman was an independent candidate for delegate to the Illinois Constitutional Convention from the 24th state senatorial district, located in Chicago. He lost that election to a candidate supported and endorsed by the defendant Democratic County Central Committee for Cook County (the "Central Committee") and the Ward Regular Democratic Organizations in the various wards in that District, each of which was headed by the Democratic ward committeeman for the ward. He lost that election by 623 votes out of a total of over 24,000 votes cast.

4. Plaintiff Michael L. Shakman is a voter and taxpayer in the City of Chicago. He is an active supporter of independent candidates for public office, that is, candidates who are not the candidates of an incumbent regular party organization, such as the regular Democratic Party

organization. He has been active in Chicago independent politics and has served as Chairman of the Independent Voters of Illinois, a political group which endorses candidates for election from both major parties. It also supports and endorses candidates for party nomination and in campaigns in which candidates do not run on party labels, such as Chicago aldermen.

5. Defendant City of Chicago (the "City") is an Illinois municipal corporation. Defendant Jane M. Byrne is the Mayor of the City and as such is its chief executive officer. The Mayor of the City is elected on a city-wide basis upon political party nomination. The legislative branch of the City consists of a City Council composed of 50 aldermen, one from each of the City's 50 wards. Aldermen are elected in elections which take place at the time of the Mayoral elections. While candidates do not run under party labels, the regular Democratic ward organization in nearly every ward supports and endorses a candidate in those elections.

6. Defendant Chicago Park District (the "Park District") is a unit of local government under the laws of Illinois. Its boundaries are coextensive with the boundaries of the City of Chicago. It is governed by a Board of five Park Commissioners, appointed by the Mayor of the City with the approval of the City Council. Mr. Edmund L. Kelly is the General Superintendent of the Park District (appointed by the Park Board) and is its chief executive officer. He is also a leading member of the Central Committee.

7. Defendant Richard J. Elrod is the Sheriff of Cook County, Illinois.

8. Defendant Thomas C. Hynes is the Assessor of Cook County, Illinois.

9. Defendant Edward J. Rosewell is the Treasurer of Cook County, Illinois.

10. Defendant Morgan M. Finley is the Clerk of the Circuit Court of Cook County, Illinois.

11. Defendant Central Committee is composed of the defendant Democratic Party Ward committeemen from each of the 50 City wards and the defendant Democratic Party Township Committeemen from the 30 Townships in the counties outside the City. It is the formal Democratic Party organization for Cook County. No party organization can use the term "regular democrat" without the consent of its Chairman.

12. Defendant George W. Dunne is the President of the Cook County Board of Commissioners and as such is the County's chief executive officer. He is also the Chairman of the Central Committee. As President of the Cook County Board of Commissioners he is also President of the Forest Preserve District.

13. Defendant Forest Preserve District of Cook County is an Illinois municipal corporation, with boundaries coterminous with Cook County. It is governed by a Board of Commissioners consisting of the members of the Board of Commissioners of Cook County.

14. On May 5, 1972, this Court entered a consent Judgment in this case enjoining various defendants and their successors and others from, *inter alia*, conditioning, basing, or knowingly prejudicing or affecting any term or aspect of governmental employment, upon or because of any political reason or factor as to persons employed for governmental employment, once they are hired. The Judgment is binding upon each of the defendants named above (other than defendant Elrod who has not and defendant Chicago Park District which has not consented to its entry).

15. Under paragraph H of the Judgment, jurisdiction was retained by the Court for the following purposes:

H. Jurisdiction is retained for the following purposes:

(1) To enable the parties to this Judgment to continue to litigate the following questions before this Court:

(a) Certain governmental employment positions under the jurisdiction of the defendants who are parties to this Judgment by their nature involve policy-making to such a degree or are so confidential in nature as to require that discharge from such positions be exempt from inquiry under this Judgment. Jurisdiction is maintained to litigate the question of which governmental employment positions under such defendants' jurisdiction are so exempt for the foregoing reasons.

(b) Can political sponsorship or other political considerations be taken into account in hiring employees? If so, to what extent can such considerations be taken into account?

(c) What remedies and implementing procedures ought to be granted and established by the Court in connection with the resolution of the questions raised in the foregoing subparagraphs (a) and (b) ?

(2) To enable the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the enforcement of compliance with the provisions contained herein, and for the punishment of the violation of any of such provisions. Application to enforce such provisions or to impose punishment for any such violation may be presented to this Court by any registered voter. Prior written notice of all such applications and other matters in this action shall be given to the named parties hereto. Except where emergency relief is sought, 7 days written notice shall be given.

16. Defendants Byrne, Finley, Rosewell, Kusper, Hynes, and defendant Dunne, as Chairman of the Central Committee, were not originally named as defendants in the First Amended Complaint. Their predecessors in office were defendants. By Supplements to the First Amended Complaint, and pursuant to Rule 25(d), Fed. R. Civ. P., these named defendants have been substituted as defendants for their predecessors in office.

Patronage Hiring by the City of Chicago

17. The City of Chicago (the "City") presently employs approximately 40,000-45,000 persons. Of these employees approximately 18,000 are police or fire officers.

18. The City hires many of its employees on the basis of regular Democratic political sponsorship, as described below.

19. The City gives preference in hiring for many City jobs to persons who are politically sponsored by Democratic Party ward committeemen or other Democratic regular organization officials. About one-half of the people hired by the City in recent years other than as police or fire officers were for jobs for which preference was given to persons with Democratic Party sponsorship.

20. For a number of City jobs persons normally can be hired only with regular Democratic *political sponsorship*. These include jobs with the Department of Sanitation, the Building Department and the Bureau of Sewers.

21. Most of the City jobs for which such political preference is given are not policy-making or confidential in nature. These jobs include, without limitation, jobs as garbage collectors, building inspectors, street cleaners, clerks, technicians and supervisors.

22. The City often informs Democratic Party officials of City job openings of which public notice is not otherwise given.

23. Persons applying for some City patronage jobs have been told by City officials that to get a job or learn about job openings the applicant must see the Democratic Party Ward Committeeman.

24. Persons hired for City jobs with Democratic political sponsorship as described above do not have civil service, contractual or statutory protection against arbitrary discharge.

25. By the conditioning and basing of terms and aspects of hiring for many positions with the City of Chicago on political factors, those employees of the City are coerced into political work and support for the regular Democratic organization.

26. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring by Cook County

27. Cook County employs persons both under the jurisdiction of the various separately elected county offices such as County Clerk, Assessor, Recorder, Treasurer, Clerk of the Court, Sheriff, and State's Attorney, and under the jurisdiction of the President of the County Board of Commissioners.

28. The County employs approximately 3,180 persons under the direct jurisdiction of the President of the County Board.

29. Many of these employees under the jurisdiction of the President of the County Board are hired on the basis of regular Democratic sponsorship as described below.

30. Cook County gives preference in hiring for many jobs under the jurisdiction of the County Board President to persons who are politically sponsored by the Democratic Party Ward or Township Committeeman or other Democratic regular organization officials. Over one-half of the

people hired by the County under the jurisdiction of the President of the County Board in recent years were for jobs for which such preference was given.

31. For a number of these County jobs persons can normally be hired only with Democratic political sponsorship.

32. Most of the jobs under the jurisdiction of the President of the County Board for which such political preference is given are not policy-making or confidential in nature.

33. The County often informs Democratic Party officials of job openings of which public notice is not otherwise given.

34. Persons hired with Democratic political sponsorship are hired under an exemption to civil service rules for so-called temporary appointments. The County civil service laws allow persons to be so employed without competitive job tests for temporary periods. Many county employees so hired remain as temporary appointments (periodically reappointed) for civil service purposes for many years and have no contractual or statutory protection against arbitrary discharge.

35. By the conditioning and basing of terms and aspects of hiring for many positions with the County of Cook on political factors, those employees of the County are coerced into political work and support for the regular Democratic organization.

36. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring by the Clerk
Clerk of the Cook County Circuit Court

37. The Clerk of the Circuit Court of Cook County employs approximately 1,700 persons.

38. The Clerk of the Circuit Court hires many of his employees through regular Democratic political sponsorship as described below.

39. The Clerk of the Circuit Court gives preference in hiring for many of his jobs to persons who are politically sponsored by Democratic Party Ward or Township Committeemen or other Democratic regular organization officials. Over three-fourths of the persons hired for full-time employment by the Clerk of the Circuit Court in recent years had such sponsorships.

40. For some of the jobs with the Clerk of the Circuit Court persons normally can be hired only with Democratic political sponsorship.

41. Most of the jobs with the Clerk of the Circuit Court for which such preference in hiring is given are not policy-making or confidential in nature.

42. Persons hired by the Clerk of the Circuit Court with political sponsorship are hired under the exemption to civil service rules for temporary appointments. Many such employees remain as temporary appointments for civil service purposes for many years and have no contractual or statutory protection against arbitrary discharge.

43. The Clerk of the Circuit Court's office often informs Democratic Party officials of job openings for which public notice is not otherwise given.

44. In at least one instance, an official charged with hiring in the office of the Clerk of the Circuit Court told a job applicant that it helps in hiring to get a sponsorship letter.

45. After defendant Morgan M. Finley succeeded Matthew Danaher as Clerk of the Circuit Court, employ-

ees in the office of the Clerk of the Circuit Court were instructed by office supervisors to obtain new sponsorship letters.

46. By the conditioning and basing of terms and aspects of hiring for many positions with the Clerk of the Circuit Court on political factors, those employees of the Clerk of the Circuit Court are coerced into political work and support for the regular Democratic Organization.

47. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring
by the Cook County Clerk

48. The Cook County Clerk employs approximately 264 persons.

49. The Cook County Clerk hires many of its employees on the basis of regular Democratic political sponsorship, as described below.

50. The Cook County Clerk gives preference in hiring for many jobs in the Clerk's office to persons who are politically sponsored by Democratic Party Ward or Township Committeemen or other Democratic regular organization officials. Over three-fourths of the persons hired for full time employment in the Clerk's office since March 9, 1973, had Democratic sponsorship.

51. For some jobs in the Clerk's office, those persons hired have normally had regular Democratic political sponsorship.

52. Most of the jobs with the Cook County Clerk for which such preference is given in hiring are not policymaking or confidential in nature.

53. The County Clerk when requested gives Democratic Party officials information on job openings as to which public notice is not given.

54. No civil service, contractual, or statutory protection against arbitrary discharge applies to any jobs with the County Clerk.

55. In at least one instance, a person applying for certain such County Clerk patronage jobs was told by County officials that to get a job or learn about job openings the applicant must see the Democratic committeeman.

56. By the conditioning and basing of terms and aspects of hiring for many positions with the Cook County Clerk on political factors, those employees of the Cook County Clerk are coerced into political work and support for the regular Democratic organization.

57. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring
by the Cook County Assessor

58. The County Assessor employs approximately 390 persons.

59. The County Assessor hires many of his employees on the basis of regular Democratic political sponsorship, as described below.

60. Preference is given in hiring for many jobs in the County Assessor's office to persons who are politically sponsored by Democratic Ward or Township Committeemen or other Democratic regular organization officials. Approximately fifty percent of the recently hired employees of the Assessor had regular Democratic political sponsorship.

61. For some jobs with the Assessor, those persons hired normally have had such regular Democratic sponsorship.

62. Most of the jobs in the Assessor's office for which such preference is given are not policy-making or confidential in nature.

63. Employees of the County Assessor give Democratic Party officials, when requested, notice of job openings as to which general public notice is not given.

64. Persons hired with Democratic political sponsorship with the County Assessor normally are hired under the exemption to civil service rules for temporary appointments. Many employees remain as such temporary employees for many years. Such employees have no civil service, contractual, or statutory protection against arbitrary discharge.

65. By the conditioning and basing of terms and aspects of hiring for many positions with the City of Chicago on political factors, those employees of the City are coerced into political work and support for the regular Democratic organization.

66. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring by the Cook County Treasurer

67. The Cook County Treasurer employs approximately 220 persons.

68. The Cook County Treasurer hires many of his employees on the basis of regular Democratic political sponsorship, as described below.

69. Preference is given in hiring for the County Treasurer's office to persons who are politically sponsored by Democratic Party Ward or Township Committeemen or other Democratic regular organization officials. Approximately one-half of the persons hired for full-time employment by the County Treasurer in recent years had Democratic sponsorship.

70. For some such jobs with the County Treasurer, historically persons hired normally have had regular

Democratic sponsorship.

71. Most of the jobs with the County Treasurer for which such preference is given are not policy-making or confidential in nature.

72. Employees of the County Treasurer, when requested, give Democratic Party officials notice of job openings as to which general public notice is not given.

73. No civil service, contractual, or statutory procedural protections against arbitrary discharge apply to any jobs with the County Treasurer.

74. By the conditioning and basing of terms and aspects of hiring for many positions with the Cook County Treasurer on political factors, those employees of the Cook County Treasurer are coerced into political work and support for the regular Democratic organization.

75. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Patronage Hiring by the Forest Preserve District of Cook County

76. The Forest Preserve District of Cook County employs approximately 650 persons full time.

77. The Forest Preserve District hires many of its employees on the basis of regular Democratic political sponsorship, as described below.

78. Preference is given in hiring for many Forest Preserve District jobs to persons who are politically sponsored by the Democratic Party Ward or Township Committeemen or other Democratic regular organization officials. Over one-half of the persons hired by the District in recent years were for jobs for which preference was given to applicants of Democratic Party sponsorship.

79. For some of the jobs with the Forest Preserve District, persons normally can be hired only with such

regular Democratic sponsorship.

80. Most of the jobs with the Forest Preserve District for which such preference is given are not policy-making or confidential in nature.

81. Employees of the Forest Preserve District often inform Democratic Party officials of job openings with the District or Cook County of which general public notice is not otherwise given.

82. Persons hired with Democratic sponsorship normally are hired under an exemption to civil service rules for temporary appointments. Many such employees remain as temporary appointments for civil service purposes for many years. Such employees have no contractual or statutory protection against arbitrary discharge.

83. By the conditioning and basing of terms and aspects of hiring for many positions with the Forest Preserve District of Cook County on political factors, those employees of Forest Preserve District of Cook County are coerced into political work and support for the regular Democratic organization.

84. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Coercive Practices of Sheriff Elrod

85. The Cook County Sheriff employs approximately 3,000 persons. About 1,250 employees in the Sheriff's police force and Department of Corrections are employed under merit employment systems. In hiring for the remaining full-time employees of the Sheriff outside of the police and correction merit employment systems, the non-merit jobs, Sheriff Elrod gives preference to applicants with the sponsorship of regular Democratic organization officials. Over three-fourths of the persons presently employed by Sheriff Elrod were given preference in hiring because

of such sponsorship. No civil service, statutory, or contractual protection against arbitrary discharge apply to non-merit employment positions.

86. The Sheriff hires many of his employees on the basis of regular Democratic political sponsorship, as described below.

87. Most of the jobs in the Sheriff's office for which such preference is given are not policy-making or confidential in nature. The non-policy making jobs include clerical, labor and maintenance type jobs.

88. The Sheriff's office keeps records as to the political sponsor for each Sheriff's employee. These records consist both of index cards on each employee and a book listing sponsored employees by wards and townships. Sheriff's employees maintain these sponsorship records as part of their normal governmental employment duties.

89. The effect of the Sheriff's office keeping records on employee sponsorship is inherently politically coercive in nature.

90. The Sheriff's office informs regular Democratic organization officials of non-merit job openings in the Sheriff's office. Applicants for such jobs are frequently obtained in this way. Notices of openings for such jobs are not regularly advertised in newspapers or posted in public places.

91. Sheriff's employees have advised job applicants who did not have regular Democratic political sponsorship that they would stand a better chance of getting a Sheriff's job if they obtained such sponsorship.

92. Sheriff Elrod took office in December, 1970. His predecessor was a Republican. In the first six months after he assumed office hundreds of employees throughout the range of the Sheriff's non-merit employment positions were fired because they did not have regular Democratic political sponsorship.

93. Existing employees in the Sheriff's office in December, 1970, were told after Sheriff Elrod took office that they could retain their jobs only if they obtained regular Democratic political sponsorship. A number of employees who either had been politically fired by Sheriff Elrod or were about to be fired were rehired or retained after they obtained regular Democratic sponsorship.

94. Of over 1500 non-merit employment positions, only 244 persons were retained by Sheriff Elrod from among those employed when he took office. Of these 244 retained employees, 192 obtained regular Democratic sponsorship after Sheriff Elrod's election. Thus, only 52 of approximately 1,500 employees in non-merit positions were retained by Sheriff Elrod without having to obtain Democratic sponsorship.

95. In December, 1974, Sheriff Elrod's Personnel Director, Mr. O'Malley, ordered various Sheriff's employees sponsored by Congressman Ralph Metcalfe to circulate and return to Mr. O'Malley during regular working hours petitions of candidacy for Mayor Daley's 1975 re-election.

96. In 1975, certain employees sponsored by Congressman Metcalfe were attempted to be transferred by Sheriff Elrod to more distant offices because of their failure so to support Mayor Daley. These transfers were discontinued when a petition for a restraining order was filed by plaintiffs in this case.

97. The Sheriff's office continues to give unfavorable job assignments to employees who fall into disfavor with their political sponsor.

98. Various Democratic Party ward committeemen have asked Sheriff Elrod to fire employees because of inadequate political performance for the committeeman but Sheriff Elrod has not, in fact, done so in recent years.

99. Sheriff's non-merit employees are not generally given any notice that political considerations are not a

basis for discharge or other job disadvantage.

100. Supervisory employees in the Sheriff's office have solicited Elrod campaign funds from subordinate Sheriff's employees. Such solicitations may have been made during regular working hours.

101. By the conditioning, basing, prejudicing and affecting of terms and aspects of employment with the Sheriff's office on political reasons and factors, employees in the Sheriff's office are coerced into political work and support for the regular Democratic organization.

102. By the conditioning and basing of terms and aspects of employment for many positions with the Sheriff's office on political factors, those employees of the Sheriff's Office are coerced into political work and support for the regular Democratic organization.

103. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Coercive Practices of the Chicago Park District

104. The Chicago Park District (the "Park District") employs approximately 3,900 persons in full-time employment. It employs approximately 760 part-time employees in the fall, winter, and spring. It also employs approximately 3,600 summer workers.

105. Over one-half of the persons hired by the Park District during each of the last three years for full-time (other than summer) positions have been hired based upon sponsorship by members of the Central Committee or other regular Democratic organization officials. Some of the part-time employees are also hired in this manner.

106. Most of the jobs for which persons are hired based upon their regular Democratic political sponsorship are not confidential or policy-making in nature.

107. Public notice (except to Democratic Party officials) of the availability of many of the jobs filled on the basis of regular Democratic political sponsorship is not normally given.

108. Persons hired by the Park District with regular Democratic sponsorship normally are hired under an exemption to civil service rules for temporary appointments. Persons hired as temporary appointments frequently remain for extended periods of time as "temporary appointments." Such employees are not protected by contract, statute, civil service provisions, or other formal procedures from arbitrary discharge or other job discipline.

109. The Park District gives preference in promotions for positions which are not policy-making or confidential in nature to persons with regular Democratic organization sponsorship.

110. The Superintendent and the Personnel Director of the Park District from time to time receive telephone calls or other oral communications from Central Committee members asking that Park District employees be fired because of their failure to do satisfactory political precinct work. In response to such requests, the Park District from time to time transfers employees to work out of the ward of the political sponsor.

111. The Superintendent and the Personnel Director of the Park District from time to time receive telephone calls or other oral communications from Central Committee members asking that Park District employees who are having employment difficulties with the Park District not be discharged, sometimes citing their good political standing. The Park District on occasion will, because of such political support, refrain from firing those employees.

112. The Park District believes that prior to 1972 the Park District fired employees upon the recommendation of the political sponsor usually because of a failure to do adequate political precinct work.

113. The Park District maintains records reflecting the wards of residence of Park District employees. The Park District uses these records to respond to requests from Central Committee members for additional jobs for politically sponsored persons from the ward.

114. The effect of the Park District's practice of keeping records on employee sponsorship is politically coercive in nature.

115. The Park District has not given notice to its employees prohibiting them from doing political work on public time or advising them that their jobs cannot be affected by political reasons or factors.

116. By the conditioning, basing, prejudicing and affecting of terms and aspects of employment with the Park District on political reasons and factors, employees in the office are coerced into political work and support for the regular Democratic organization.

117. This support helps the regular Democrats win elections in the City of Chicago and Cook County. It provides them with a significant advantage in those elections.

Total Patronage Extent

118. The total number of jobs for which preference is given in hiring to persons with regular Democratic sponsorship with the City, Cook County, County officers, the Forest Preserve District and the Park District is at least 20,545.

119. The total salaries paid for such Democratic patronage workers exceeds $200,000,000.

Political Sponsorship

120. Usually, persons get sponsorship for a City, County, County officer, Park District, or Forest Preserve District job from a regular Democratic organization official either after having done or upon the expectation that they

will do political precinct work (such as door to door canvassing, putting up posters, etc.) on behalf of candidates endorsed by the sponsor.

121. Democratic political sponsorship for government jobs is usually communicated by a sponsorship letter to the employing office.

122. Members of the regular Democratic organization generally sponsor persons for governmental employment on the basis, among other considerations, of their support or promise of support of the regular Cook County Democratic organization, the sponsor's ward or township organization or other party units and of their endorsed candidates. Many such job applicants are required as a condition of obtaining such sponsorship to do or to promise to do precinct or other political work for such endorsed candidates or to make or to promise to make financial contributions to party organizations.

123. Usually, no person is sponsored by regular Democratic organization officials for public jobs if he or she has in any open way been a worker or partisan of any political group opposed to or by the regular Democratic organization of the sponsor. On some occasions such persons are so sponsored if they agree to switch political affiliation and agree to support the regular Democratic organization and its candidates.

Continued Coercion

124. Despite the entry of the Judgment, there have been some instances in which City or County officials or members of the Central Committee have pressured Democratically sponsored employees into doing political work on behalf of the regular Democratic organization.

125. Defendants' patronage hiring practices described above are inherently politically coercive since sponsorship is based upon the requirement or expectation of the applicant doing political precinct work. In

addition, some of the employees do not have any effective guarantee of procedural protection against arbitrary discharge or job discipline.

The Regular Democratic Organization and Patronage

126. In each ward of the City and in many townships in the County outside the City there is a regular Democratic Party organization. In most cases the organization has the title (*number* or *name*) Ward (or Township) Regular Democratic Organization. Usually the ward or township Regular Democratic Organization is headed by the ward or township Democratic party committeeman. In one or two wards in the City, however, where the elected committeeman is not a supporter of the leadership of the Democratic County Central Committee, the regular Democratic organization is headed by someone else who has the privilege of sponsoring persons for public office. Most of the regular Democratic organizations maintain permanent offices from which they conduct political business.

127. In most wards and townships in the City sponsorships for public jobs are handled by the head of the regular Democratic organization.

128. The regular Democratic organization in Cook County, that is the Central Committee (or, in the case of local elections, the various ward and township regular Democratic organizations) almost always supports and endorses candidates for election, even in elections which are formally non-partisan.

Political Impact of Democratic Patronage Practices

129. The patronage employment system described above helps regular Democrats win elections. It provides a significant advantage in Chicago and in Cook County, Illinois, to candidates supported by the regular Democratic organization and a corresponding disadvantage to opposing

candidates, including independent candidates and Republicans. Independent candidates have essentially no patronage precinct workers and Republicans in Chicago have few patronage precinct workers.

130. Democratic party officials believe that patronage hiring is very important for them to maintain their election advantage.

NICHOLAS J. BUA, Judge
United States District Court

DATED: September 24, 1979

091787-0165

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al., Plaintiffs,

v.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al., Defendants.

No. 69 C 2145.

United States District Court,
N.D. Illinois, E.D.

April 4, 1983.

JUDGMENT

BUA, District Judge.

The instant Judgment represents the implementation order with regard to the hiring aspect of the *Shakman* case. The case began in 1969 when the U.S. District Court for the Northern District of Illinois, Marovitz, J., dismissed the complaint of the plaintiffs. *Shakman v. Democratic Organization of Cook County*, 310 F.Supp. 1398 (N.D.Ill.1969). On appeal from the dismissal, the Seventh Circuit reversed. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir.1970). After the Supreme Court denied certiorari, 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971), settlement negotiations began. On May 5, 1972, the Court approved and entered a Consent Decree relating to those employees already hired as government employees. In essence, the Decree purported to free the government employees from all coercion and employment discrimination based on political

considerations.[1] *See, Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1356 (N.D.Ill.1979).[2]

On September 24, 1979, this Court granted plaintiffs' Motion for Partial Summary Judgment. *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D.Ill.1979). The Court essentially found that in hiring persons for governmental employment, the defendants listed in Paragraph C below illegally conditioned, based, and affected the hiring of persons for government employment upon and because of their political sponsorship, affiliation and support. In so holding, the Court left the specific form of the remedy for another time. Numerous hearings have been held and voluminous memoranda have been considered concerning the form of relief as it is presented herein.

The Judgment is entered to provide relief for the violations of plaintiffs' rights as determined in the September 24, 1979 order and to prevent further such violations. The Court is authorized to enter such relief under its equity powers as recognized in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). *See also, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

As required by *Hills v. Gautreaux*, 425 U.S. 284, 96

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[1] Most often, the Consent Decree has been utilized as a basis for a Petition For A Rule To Show Cause why a particular defendant should not be held in contempt of court in connection with the termination of an employee.

[2] The parties to the original Consent Decree are set out therein. On April 3, 1978, the Consent Decree was entered binding the Cook County Treasurer as of November 30, 1973; the Cook County State's Attorney as of April 3, 1973; the Republican County Central Committee as of May 18, 1972; and the Forest Preserve District as of June 28, 1972. On June 27, 1980, the Consent Decree was entered binding the Cook County Sheriff and the Chicago Park District.

S.Ct. 1538, 47 L.Ed.2d 792 (1976), the nature of the relief contained herein has been tailored to fit the nature and extent of the violations which have been found. The Judgment goes no further than to attempt to eliminate political considerations in the hiring of government employees. It does not impose a civil service system nor does it necessitate that a merit system be utilized.

Therefore, it is hereby Ordered, Adjudged, and Decreed as follows:

A. **Jurisdiction.** This Court has jurisdiction of the parties to this Judgment and of the subject matter of this action under Sections 1331 and 1343(3) of Title 28 of the United States Code.

B. **Definitions.** As used in this Judgment (1) the term "Government Employment" means any employment (whether full-time or part-time, permanent or temporary, and regardless of whether the employment is paid for by Federal funds) by or for the City of Chicago or any employment within the Northern District of Illinois by or for the County of Cook or any other nonfederal governmental officer or entity; (2) the terms "Governmental Employee" and "Employee" mean a person employed in Governmental Employment; (3) the term "Exempt Position" means a Governmental Employment job, which is determined to be exempt from the provisions of Paragraphs D and E of the Consent Judgments and Paragraphs D through M, inclusive, of this Judgment, all as provided in Paragraph N below; (4) the term "Consent Judgments" means the Judgments previously entered in this case as to defendants listed in Paragraph C below upon the consent of plaintiffs and various defendants on May 5, 1972, April 3, 1978, and June 27, 1980; and (5) the term "Defendant Public Employer" means each defendant listed in Paragraph C which is a governmental unit or who is a governmental officeholder (and the successors in office to those persons).

C. **Persons Bound.** The provisions of this Judg-

ment apply to the following: (1) Defendants: CITY OF CHICAGO; JANE M. BYRNE, individually and as Mayor of the City of Chicago; FOREST PRESERVE DISTRICT OF COOK COUNTY, Illinois; CHICAGO PARK DISTRICT; RICHARD J. ELROD, individually and as Sheriff of Cook County, Illinois; MORGAN M. FINLEY, individually and as Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, individually and as Treasurer of Cook County, Illinois; STANLEY J. KUSPER, JR., individually and as Clerk of Cook County, Illinois; THOMAS C. HYNES, individually and as Assessor of Cook County, Illinois; GEORGE W. DUNNE, individually, as President of the Board of Commissioners of Cook County, Illinois and as President of the Board of Commissioners of the Forest Preserve District of Cook County, Illinois; DEMOCRATIC PARTY COUNTY CENTRAL COMMITTEE FOR COOK COUNTY and its members; EDWARD R. VRDOLYAK, individually and as Chairman of the Democratic Party County Central Committee for Cook County, Illinois; (2) their successors in each of those capacities; (3) the present and future officers, members, agents, servants, employees and attorneys of each of those Defendants and others named or referred to in this paragraph; and (4) all others in active concert or participation with Defendants or others named or referred to in this paragraph who receive actual notice of this Judgment, by personal service or otherwise.

D. **Declaratory Relief.** It is hereby declared that the conditioning, basing, or affecting of the hiring of Governmental Employees (other than for Exempt Positions) upon or because of any political reason or factor including, without limitation, any propsective employee's political affiliation, political support or activity, political financial contributions, promises of such political support, activity or financial contributions or such prospective employee's political sponsorship or recommendation is prohibited.

E. **Injunction.** Defendants and all others named or

referred to in Paragraph C above are permanently enjoined from directly or indirectly, in whole or in part:

(1) conditioning, basing or knowingly prejudicing or affecting the hiring of any persons as a Governmental Employee (other than for Exempt Positions), upon or because of any political reason or factor including, without limitation, any prospective employee's political affiliation, political support or activity, political financial contributions, promises of such political support, activity or financial contributions, or such prospective employee's political sponsorship or recommendation; or

(2) knowingly inducing, aiding, abetting, participating in, cooperating with the commission of any act which is proscribed by this Paragraph E, or threatening to commit any act proscribed by this Paragraph E.

F. **Plan of Compliance**. Each Defendant Public Employer shall, not later than 120 days from the date this Judgment becomes effective, file with the Court, with copies to all parties to this Judgment, a Plan of Compliance to implement this Judgment.

The Plan of Compliance shall set forth in detail a method or methods of hiring to be used for all Governmental Employment positions (other than Exempt Positions) with that employer. Each such method of hiring shall establish criteria for hiring which shall establish on an objective basis that the method complies with Paragraphs D and E above. The method or methods of hiring set forth in the Plan of Compliance shall be within the discretion of the Defendant Public Employer, as long as the method or methods comply with the requirements of this Judgment.

Each Plan of Compliance shall also provide for the instruction of persons having responsibility for hiring as to the requirements of this Judgment and the Plan of Compliance and shall provide for the monitoring of compliance with this Judgment and the Plan of Compliance.

Any party believing that the Plan of Compliance of any Defendant Public Employer is not in compliance with this Judgment, or is inadequate to ensure compliance with this Judgment may apply to the Court for further orders to enforce compliance, including directing changes in the Plan of Compliance. Within one year of the date this Judgment becomes effective, each Defendant Public Employer shall implement the Plan of Compliance as so filed and as it may be so changed.

A Plan of Compliance may contain provisions providing for the means by which hiring methods may be changed, consistent with this Judgment, and shall provide for appropriate notice to be given the parties of such proposed changes.

G. **Notices of Job Availability.** Each Defendant Public Employer, and all others named or referred to in Paragraph C above, are permanently enjoined from hiring any person for any Governmental Employment position (except Exempt Positions and except, as provided below, for emergency hiring) unless prior public notice of the opportunity to apply for and be hired for the job has been given. This requirement shall apply to hiring of persons after a date 60 days after this Judgment becomes effective.

During the period of ten years after this Judgment becomes effective, the method of giving notice shall be as provided by this paragraph, unless an alternative method is approved by the Court. The notice shall be given at least 14 days before the last date for which applications may be submitted for consideration for the job. The notice shall include a description of the nature of the job, the qualifications, the pay, and how and where to apply for the job. The notice shall be given in the following manner:

> (1) by prominently posting the notice for inspection by the general public at each place where persons may make application for Governmental Employment with that Defendant Public Employer. (A list of all such available job opportunities with the Defendant Public Employer shall

similarly be posted. The list must be updated at least monthly. Copies of the list and of all such notices shall be provided free of charge to each person who requests a copy in person); and

(2) by mailing copies of the list of available job opportunities to each person who shall have requested receiving such notices by mail. (Defendant Public Employers may provide in their Plan of Compliance for a charge to persons requesting notices by mail of a reasonable fee to cover postage costs.)

In lieu of the manner set forth in Subparagraphs G(1) and G(2), notice may be given in the manner required by statute as to any position which is to be filled by the highest ranking applicant on competitive examinations.

A Plan of Compliance may make provision for establishing reasonable limits on the period during which a person shall be entitled to continue to receive by mail notices of job opportunities after having most recently requested the notice.

A Plan of Compliance may make reasonable provisions for hiring persons in exceptional, emergency situations without prior notice having been given as provided in this paragraph. Any such provision shall contain rigorous limitations on the number of persons who may be so hired in a year. The Plan of Compliance shall also provide for regular reports to the Court of instances in which such emergency hiring was made, setting forth the reasons why it was an emergency situation, including why it was not possible to have made arrangements by which the hiring could have been made upon prior notice.

H. **Notice of List of Jobs.** Each Defendant Public Employer shall cause to be published, at least once each calendar quarter for a period of ten years following the date this Judgment becomes effective, in the "help wanted" section of a Chicago daily newspaper having a circulation of greater than 200,000, a prominent notice of the existence

and availability of the list described in Subparagraph G(1), stating where the list is available for public inspection, where copies may be obtained in person and how persons may receive copies of the list by mail.

I. **Notice to Employees.** Each Defendant Public Employer shall cause a copy of the Notice which is attached to this Judgment, together with a copy of this Judgment, to be delivered within 30 days of the date this Judgment becomes effective to each Governmental Employee of such Defendant.

J. **Notice to Job Applicants.** Each Defendant Public Employer is directed, for a period of ten years following the date this Judgment becomes effective, to cause copies of the Notice referred to in Paragraph I, together with a copy of this Judgment, to be delivered to each applicant for Governmental Employment with such Defendant Public Employee. The Notice shall be delivered to each applicant no later than the time the applicant is furnished a job application for the Governmental Employment position.

K. **Posting of Judgment.** A copy of this Judgment and a copy of the Notice referred to in Paragraph I shall be prominently posted at each place where persons may make applications for employment with each Defendant Public Employer. Copies of this Judgment and such notice shall remain so posted for a period of ten years following the date this Judgment becomes effective. A notice similarly posted shall state that copies of the notice referred to in Paragraph I and of this Judgment are available to any person who requests them.

L. **Affidavits of Compliance**. Each Defendant Public Employer shall cause to be filed with the Clerk of this Court within 45 days of the date this Judgment becomes effective an affidavit showing compliance with Paragraph I. Each Defendant Public Employer shall cause to be filed with the Clerk of this Court prior to the last day of each calendar quarter, beginning with the year in which this Judg-

ment becomes effective and ending ten years after that year, an affidavit showing compliance with Paragraphs G, I, J and K for the period since the last date covered by the most recent affidavit. Such quarterly affidavits shall list the name and position of all persons hired since the most recent such affidavit by each such Defendant Public Employer. The affidavits shall also disclose the name and party position of every person, reasonably known to the Defendant Public Employer to be a political party official, member, employee or agent, who has directly or indirectly recommended or sponsored the Employee for Governmental Employment. Nothing in this paragraph shall require any person to make any inquiry as to any person's political affiliation.

M. **Annual Reports**. In each of the years 1983 through 1992, inclusive, each Defendant Public Employer shall file a verified report (prior to March 1 of the year), with copies to all parties to this Judgment, detailing all steps taken in the preceding year to implement the Plan of Compliance referred to in Paragraph F and otherwise to comply with this Judgment and also stating all changes in methods of hiring persons for Governmental Employment made since the last date covered by the last such report or, in the case of the first report, since the date this Judgment becomes effective.

N. **Exempt Positions**. Defendant Public Employers may, from time to time, apply to the Court for a determination that political party afiliation or activity are appropriate requirements for the effective performance of certain Governmental Employment positions and therefore that hiring for or discharge from such positions should be exempt from inquiry under this Judgment and the Consent Judgments. Prior to entry of any order of Court determining a position to be an Exempt Position, no position shall be exempt from this Judgment and no action with respect to any such position shall be exempt from inquiry under

this Judgment, except as provided in Paragraph O of this Judgment.

O. **Interim Exempt Positions**. Each Governmental Employment Position which is listed or referred to in the List of Interim Exempt Positions, a copy of which is attached to and made a part of this Judgment, shall be treated as a position, the hiring for which is, during the period specified in this Paragraph O, exempt from the provisions of Paragraphs D through M of this Judgment. The period during which such positions with a Defendant Public Employer shall be so exempt is the period beginning on the date this Judgment becomes effective and ending when the Court enters its first order, pursuant to Paragraph N of this Judgment, determining which positions with that employer are to be Exempt Positions. That a position is listed or not listed as an interim Exempt Position shall have no bearing whatsoever on the determination of whether a position shall be determined to be or not to be an Exempt Position pursuant to Paragraph N of this Judgment or pursuant to Paragraph H of the Consent Judgments.

P. **Consent Judgments**. This Judgment is in addition to the Consent Judgments and is issued pursuant to Paragraph H of the Consent Judgments.

Q. **Jurisdiction Retained**. Jurisdiction is retained for the following purposes:

(1) To enable the parties to this Judgment to apply to this Court for orders determining which Governmental Employment positions are Exempt Positions as provided in Paragraph N;

(2) To enable the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the Consent Judgments and this Judgment, for the enforcement of compliance with the provisions contained in the Consent Judgments and this

Judgment, and for remedy for the violation of any of those provisions. Application to enforce those provisions or to remedy any violation may be presented to this Court by any registered voter. Prior written notice of all such applications and other matters in this action shall be given to the named parties to this Judgment;

(3) To enable the parties to this Judgment to apply at any time for modifications to the requirements of Paragraphs F through M of this Judgment, which modifications shall be warranted by good cause and consistent with or necessary for the implementation of Paragraphs D and E;

(4) To determine whether provisions of this Judgment which by their terms may expire upon a term of years should be extended for a further period; and

(5) To determine the amount of plaintiffs' costs and attorneys' fees. Defendants shall pay plaintiffs' costs and attorneys' fees if so determined by Court order.

R. **Effectiveness**. The Court expressly finds and determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay. It directs that this Judgment now be entered and be effective upon its entry.

IT IS SO ORDERED.

(List of Interim Exempt Positions and Notice deleted)

United States District Court

Northern District of Illinois

Eastern Division

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,
Plaintiffs,

v.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al.,
Defendants.

No. 69 C 2145

Honorable Nicholas J. Bua, Presiding

April 18, 1985

ORDER

The following defendants have filed motions to alter or amend the Court's April 4, 1983 judgment in this cause: Democratic Party County Central Committee for Cook County and its members; Edward R. Vrdolyak; Forest Preserve District of Cook County; Richard J. Elrod; Edward J. Rosewell; Stanley T. Kusper, Jr.; Thomas C. Hynes and George W. Dunne. For the reasons stated below, defendants' motions are granted in part and denied in part.

Defendants' misinterpretation of the Decree does not warrant reconsideration or amendment of the April 4 Judgment Order. First, the injunctive provisions of the Court's judgment are neither vague nor overbroad. The Decree does not inhibit anyone's voluntary political activities, but rather the judgment simply provides that, for non-exempt jobs, a person's lawful political activity, or lack of such activity, is to have nothing to do with getting or keeping a job. Neither does the Decree impose a civil service sys-

tem as defendants contend. *See* Judgment Order dated April 4, 1983, at 2 ("The Judgment goes no further than to attempt to eliminate political considerations in the hiring of government employees. It does not impose a civil service system nor does it necessitate that a merit system be utilized.") Second, defendants' argument that the Decree improperly excludes party leaders from any role in the hiring process is without merit. Although the Decree does prohibit the existing system by which hiring decisions are delegated to ward and township committeemen, the Decree does not prohibit party leaders from disseminating public information concerning job openings, referring people to employment offices of the defendants, or even from recommending persons about whom they have specific job related information. The Decree simply prohibits hiring which gives political recommendations more weight than other relevant recommendations (including recommendations of rival political groups). Third, defendants argue that the Decree is overbroad because it applies to "all others in active concert or participation with defendants . . . ." Defendants' argument, however, is without merit since the language of the Decree is taken verbatim from Rule 65(d) of the Federal Rules of Civil Procedure.

Defendants' objections to the reporting requirements of the Decree are similarly without merit. Given the long history of the patronage hiring practices in issue here, the requirement that there be, for a limited period, a report on all politically recommended hiring is an entirely reasonable monitoring device. The Decree does not prohibit any hiring of such persons. The Decree does, however, enable the parties to determine if politically recommended hiring occurs to such an extent as to question the general compliance with the provisions of the decree. This reporting provision of the Judgment is vital for there to be adequate monitoring of compliance with the Decree, without detailed judicial supervision of hiring systems. The provisions are modest and reasonable requirements.

Notwithstanding defendants' argument to the contrary, the enforcement provisions of the judgment are not overly broad. Defendants argue that registered voters should not be allowed to enforce the Decree. This provision of the decree, however, serves to enable the protected classes of persons to enforce the decree. By allowing enforcement actions to be brought by registered voters, the Decree provides a means for the protected classes to enforce the Decree while maintaining privacy as to how one casts one's ballot.

Neither are the provisions of the Decree for interim exemptions inappropriate. The Judgment provides that the Court's jurisdiction is retained to determine which positions should be exempt from the Decree. Exemptions are necessary in order to ensure that prevailing candidates are able lawfully to direct the policies of the governmental office to which they are elected. The Decree provides for interim exemptions from its provisions, until defendants establish which positions need permanently to be exempted. For the County officers, the Decree provides exemptions for private secretaries, executive heads of departments and, in total, up to 125 additional positions. The additional positions are to be designated by the governing board of the County, its Board of Commissioners. This technique of dealing with exemptions for County officers was necessitated precisely because those officers defaulted in requesting exemptions from the decree. No County officer has ever filed a petition for a single position to be exempt. In light of the County officers' failure to seek exemptions, the provisions of interim exemptions are eminently reasonable. Likewise, the Central Committee's argument that the number of interim exemptions is too small is without merit in light of defendants' failure to petition the Court for additional interim exemptions.

Defendant Forest Preserve District's contention that it has been denied an opportunity to defend itself is frivolous.

Defendants' argument that the Court erred in granting plaintiffs summary judgment on liability is equally without merit.

Finally, three minor aspects of the Court's April 4, 1983 Judgment are amended as follows:

In Paragraph C of the April 4, 1983 Judgment Order, the following defendants are deleted: City of Chicago; Jane M. Byrne, individually and as Mayor of the City of Chicago; Chicago Park District; Richard J. Elrod, individually and as Sheriff of Cook County, Illinois; Morgan M. Finley, individually and as Clerk of the Circuit Court of Cook County, Illinois; Edward J. Rosewell, individually and as Treasurer of Cook County, Illinois. These defendants have entered into separate consent judgments.

(1) In Paragraph L, line 13, of the April 4, 1983 Judgment Order, the word "member" is deleted. Since any person who votes in an Illinois primary is technically a "member" of a political party, it will be sufficient to require defendants to submit affidavits of compliance which report all direct or indirect recommendations or sponsorships from "a political party official, employee or agent."

(2) In Paragraph M of the April 4, 1983 Judgment Order, the phrase "years 1983 through 1992" is amended to read "years 1984 through 1992."

For all of the above reasons, defendants' motions to alter or amend judgment are granted in part and denied in part.

IT IS SO ORDERED.

/s/ Nicholas J. Bua

NICHOLAS J. BUA
Judge, United States District Court

Dated: April 18, 1985

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 5, 1987.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

Nos. 85-1870, 85-1911, 85-1912

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,
Plaintiffs-Appellees,
v.
GEORGE W. DUNNE, et al., FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS, and DEMOCRATIC PARTY COUNTY CENTRAL COMMITTEE FOR COOK COUNTY AND ITS MEMBERS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 69 C 2145

Nicholas J. Bua, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, with directions, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

SEPTEMBER 30, 1987.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,
Plaintiffs-Appellees,
v.
No. 85-1870, 85-1911, and 85-1912

GEORGE W. DUNNE, et al.,

and

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

and

DEMOCRATIC PARTY COUNTY CENTRAL COMMITTEE FOR COOK COUNTY and its members, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois Eastern Division.

No. 69 C 2145.

Nicholas J. Bua, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellees on August 19, 1987, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,

Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision that the Petitioners, a class of candidates and voters, lacked standing to challenge hiring practices, is consistent and in accord with this Court's decisions requiring a plaintiff to demonstrate injury fairly traceable to defendants.

2. Whether there is any basis for review of the merits, where the Court of Appeals did not reach the question of the constitutionality of the challenged hiring practices, and the alleged importance of the issue therefore no more serves as a reason to grant the writ than it confers standing.

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No. 87-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,

Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Petitioners' Statement of the Case is argumentative, and Respondents[1] offer the following to correct material inaccuracies and omissions. The Court of Appeals decision contains a detailed history of the case. (1a-11a)

[1] Respondents to the instant petition, Defendants-Appellants in the Court of Appeals, are George W. Dunne, President of the Cook County Board of Commissioners; Stanley T. Kusper, Jr., County

(Footnote continued on following page)

Petitioners were certified as a class of candidates and voters in Cook County, Illinois. The district court held that Petitioners have no standing, as candidates and voters, to assert any rights of employees or of job applicants. (61a, 63a) The Court of Appeals held that they further have no standing, as candidates and voters, to challenge hiring practices of Respondents.

Petitioners' Statement of the Case discusses the situation alleged at the time the complaint was filed in 1969. That situation was not before the Court of Appeals for its 1987 decision:

> The case before us today is, from a *factual* viewpoint, a very different case from that set forth in the complaint. The consent decree with respect to politically-motivated discharges . . . has eliminated a significant portion of the contentions . . . originally presented. (11a) [emphasis the Court's]

The Court further found that:

> The combined impact of political hiring and firing practices—a significant part of the plaintiffs' original case—is therefore not before us on this appeal. (12a)

Thus, Petitioners' references to harm from some "massive political effort", and to a "massive" or "extensive patronage hiring system" (Pet. *i.e.*, at 5, 6, 8), to coercion or to requirements for keeping jobs (Pet. at 4), are

---

[1] *continued*
Clerk of Cook County; Thomas C. Hynes, Assessor of Cook County; the Cook County Forest Preserve District; and the Democratic County Central Committee of Cook County. These parties, who were defendants in the District Court, appealed the judgment as to hiring practices. Other defendants, officials of Cook County and of Chicago, did not appeal, but entered into consent judgments regarding hiring practices. The Democratic County Central Committee of Cook County is not a party to this Brief in Opposition.

references to the allegations at the inception of this litigation, to allegations in the Complaint which the Court of Appeals found no longer to be at issue. Petitioners' example of the alleged substantial effect of patronage practices is Mr. Shakman's own election loss, in 1969.[2] (Pet. at 5)

As the Court of Appeals found, those practices have been substantially and significantly modified by the earlier consent decrees. The Respondents, as well as the defendant officials who did not appeal the hiring judgment, had all entered into a consent judgment (121a-127a) in which they agreed that they were prohibited from

> "conditioning, basing, or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." (5a)

Therefore, any hiring done, with or without political considerations, is hiring to fill vacancies, because current employees cannot be discharged, or otherwise subjected to adverse action, based upon political considerations.

The earlier decision of the Court of Appeals, in 1972, had relied for its finding of standing upon allegations of:

> the misuse of official power over public employees so as to create a substantial, perhaps massive, effort in favor of the ins and against the outs. (39a)

---

[2] Petitioners attempt to attribute Mr. Shakman's defeat to patronage. The record establishes that Mr. Shakman was one of four candidates running for two seats to the Illinois Constitutional Convention. Mr. Shakman was the only white candidate in a predominantly black district. The other independent candidate received the largest number of votes, while Mr. Shakman, who placed third, received more votes than one of the "regular Democratic" candidates.

This holding was prior to the consent decrees, and referred explicitly to coercion of employees. The Court in 1972 warned that:

> care will be required to distinguish between compelled and voluntary political support by public employees. (40a)

In the opinion which is the subject of the instant petition, the Court of Appeals relied for its finding that Petitioners lack standing upon the changed factual context, in that any work done by employees is voluntary, not coerced.[3] The Court of Appeals found to be "particularly attenuated" the plaintiffs' claims that their rights as candidates and voters were infringed because persons who might want to seek government employment might be reluctant to support candidates not yet elected to office. (20a) The Court stated that many factors influence political activity, and pointed out that incumbency has both advantages and disadvantages. (20a-21a) In addition, any candidates, once elected, may offer vacant jobs to supporters. (20a)

This case was decided in the district court on cross-motions for summary judgment. Defendants had offered several affidavits of local political science professors and other experts, that political hiring practices have no significant effect on the outcome of elections. Plaintiffs offered several affidavits of other professors and of candidates reaching the opposite conclusion.

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[3] The Court expressly stated that it was not deciding whether plaintiffs would have standing to challenge coerced political work by those already employed. (23a, n. 14)

The summary judgment filings showed that at the time, there were approximately 20,000 positions to which, if they were vacant, the challenged hiring practices might be applicable. This number includes both the City of Chicago and Chicago Park District, as well as the Cook County defendants. At the time the summary judgment motions and supporting evidence were filed, those entities employed about 58,000 employees, or 118,000, if the Chicago Board of Education and Chicago Transit Authority (as it was then called) were included.

Petitioners incorrectly state that "persons who in any way openly support independent candidates are excluded from these jobs." (Pet. at 7) The district court's opinion, cited by Petitioners, refers to "usually" or "normally" and does not refer to "any . . . open" support. (55a) No defendant admitted "needing" politically based hiring to obtain campaign workers to win elections. (Pet. at 7) Defendants did admit that one purpose of giving hiring preferences is to try to help win elections. The Court of Appeals noted that this states the obvious, but that job seekers may react in any number of ways to numerous factors, including their assessments of the campaign. (20a-21a)

The district court's decision, according to Petitioners, was based on use by "the State" of "coercive power." (Pet. at 9) The Court of Appeals found that coercion was no longer at issue (11a-12a), and that Petitioners cannot fairly trace any injury to Respondents' hiring practices. (20a-25a) The Court of Appeals denied Petitioners' Motion to Stay the Mandate, on October 27, 1987.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DECISION THAT PETITIONERS HAVE NO STANDING TO CHALLENGE HIRING PRACTICES IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Once Petitioners finally address the question of standing, they erroneously base their claim on the allegations of the complaint, which as the Court of Appeals found, have been substantially eliminated as a result of the 1972 consent decree barring politically motivated coercion or other adverse action affecting incumbent employees. Petitioners' entire argument begs the question by assuming the substantial impact which they alleged in 1969, but which no longer exists.

The Court of Appeals found that in light of the changed factual nature of this litigation as a result of the early consent judgment, as well as this Court's modification or clarification of the standing requirement, the Petitioners, who are candidates and voters, have no standing to challenge hiring practices. Petitioners' "particularly attenuated" claims depend upon speculation as well as countless independent factors. They therefore cannot establish any injury fairly traceable to the practices challenged, and cannot assert a case or controversy as required by Article III, §2 of the United States Constitution. This holding of the Court of Appeals is absolutely consistent and in accord with this Court's decisions on standing.

The Court of Appeals relied upon decisions of this Court for the elements of standing analysis, quoting from *Allen v. Wright*, 468 U.S. 737, 751 (1984):

> A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be addressed by the required relief. (14a)

The Court of Appeals also referred to *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and a number of earlier decisions of this Court. (14a)

Following other aspects of this Court's analyses, the Court of Appeals refused to confer standing based on speculation (*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976); *Warth v. Seldin*, 422 U.S. 490, 507 (1975)), or upon Petitioners' contentions that the hiring practices are unlawful (*Warth v. Seldin, supra*, 422 U.S. at 500). The intervention of numerous independent decisions and decisionmakers breaks any assertion of causality and defeats a claim of standing. *Allen v. Wright, supra*, 468 U.S. at 746, 759; *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 40-43, 45.

As in these cases, the Court of Appeals correctly found in the instant case no "fairly traceable" connection between the challenged hiring practices and any harm to the Petitioners' speech and associational rights as candidates and voters. (20a-21a) Too many factors, decisions and decisionmakers intervene. Petitioners' claim truly rests upon their speculation as to what uncounted and unidentified political contributors and workers, voters, and job applicants will choose to do, in infinitely variable situations, and what impact, if any, it will have.

Petitioners' suggestion in a footnote that these decisions are not independent, because "patronage employees and applicants" are "required" to provide political support, is a plain misstatement, correction of which utterly defeats

their argument. Political work, or support, or contributions, cannot be required of employees. Petitioners ignore both the consent decree and this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Moreover, no prospective job applicant is required to do anything. It is just those independent assessments and decisions cited by the Court of Appeals which any such prospective applicant must make in determining whether or not he or she wishes to give any candidate political support, or wants to seek employment at some job in the office of some elected official.[4] Petitioners' attempt to diminish the analysis of the Court of Appeals is thus without merit.

Thus far, the only decision from a Court of Appeals on a similar issue is *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), which found that the plaintiff candidates and voters had no standing to challenge various practices of the incumbent President of the United States, which they claimed infringed their rights to an equal chance in

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[4] Moreover, that decisionmaking is not based on the prospect of any total exclusion from public employment, as Petitioners imply. At the time of submission of the summary judgment evidence, there were about 20,000 jobs (most of which, of course, are occupied by incumbents at any given time) to which the hiring practices were said to be applicable, while Cook County, Chicago and the Chicago Park District employed a total of about 58,000, or 118,000 employees, if the Chicago Board of Education and (then called) Chicago Transit Authority were included. Since then, groups of employees have, through statutory or other changes become "merit" or civil service employees. *See, i.e.*, Ill. Rev. Stat. 1985, ch. 125, §§56, 58, effective July 1, 1984, bringing Cook County Sheriff's Deputies ("full time deputy Sheriffs") under the Cook County Sheriff's Merit Board. Thus, most of the jobs in geographical Cook County are not even involved in the challenged hiring practices. It is also a fact that all elected offices are not held simultaneously by members of the same political party, let alone the same faction of any party.

their support of the candidacy of Edward Kennedy. *Winpisinger* included a challenge to the "grant[ing] and withhold[ing of] public employment based upon political support by the employee." 628 F.2d at 135. A single "example" given by the Court is the hiring of 275,000 persons to take the census. 628 F.2d at 136. The practice of this political hiring, even coupled with all of the other listed practices, was still held to be only remotely and speculatively connected to any harm to, or dilution of, the plaintiff candidates' and voters' First and Fifth Amendment rights. The Court specifically distinguished both *Baker v. Carr*, 369 U.S. 186 (1962), and *Elrod v. Burns*, 427 U.S. 347 (1976), because they involved "direct tangible injury." 628 F.2d at 138.

The Court of Appeals agreed with *Winpisinger*, finding it instructive in:

> assessing whether the plaintiffs have demonstrated the requisite causality between their alleged injury and the actions of a political incumbent. It is no easier to measure the effect of an incumbent's promises on the ebb and flow of the political tide in Cook County, Illinois, than it is in any other political context. (23a)

Thus the decision in this case is consistent, not only with the opinions of this Court, but with the only other Circuit to consider the question.[5]

Other decisions of this Court further refute the Petitioners' claims of injury. In *Buckley v. Valeo*, 424 U.S. 1 (1976), which Petitioners cite (Pet. at 19), this Court

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[5] The District Court also dismissed claims of voters based on lack of standing in *Rutan v. Republican Party of Illinois*, 641 F. Supp. 249, 256 (C.D. Ill. 1986) (appeal pending), a case challenging, *inter alia*, hiring practices.

found that the First and Fifth Amendment rights of the plaintiffs were not harmed even by statutes which explicitly denied funding to small political parties. If the funding of some parties with significant support, but not minority parties, was not held to be an impediment to the chances of the minority parties in *Buckley, supra,* then the suggestion that the challenged hiring practices are an impediment is even more untenable. The connection between the practices of officials and the rights of the plaintiffs in *Buckley* was clear and direct compared to that in the instant case.

Moreover, in *Laird v. Tatum,* 408 U.S. 1 (1972), this Court held that the petitioners, who were challenging a government surveillance system, had no standing. Their assertion of the chilling of their First Amendment rights by virtue of knowledge of governmental activities was insufficient to confer standing. 408 U.S. at 11. Likewise, the Petitioner candidates and voters in the instant case, who assert a "chilling" of their First Amendment rights, have not and cannot demonstrate that they have been harmed, a prerequisite, indeed the *sine qua non,* of standing.

Petitioners rely upon a truly inapposite case, *Tashjian v. Republican Party,* ____ U.S. ____, 107 S.Ct. 544 (1986), in support of the obvious proposition that voters can "challenge state burdens" on association. (Pet. at 19) In *Tashjian,* however, the statute in question directly and absolutely prohibited persons not affiliated with a political party from voting in that party's primary election. Even with such a direct burden on the electoral process and the rights of voters to vote for whomever they chose, the decision was five to four.

In the instant case, however, no aspect of the electoral process is challenged, and no voter is prohibited from

voting for any candidate, as the Court of Appeals emphasized. (17a-18a) Consequently, *Tashjian*, which was not a standing case, is instructive only as to what may constitute a direct and fairly traceable injury in the electoral process. By comparison, moreover, it demonstrates the utterly speculative nature of Petitioners' claims as to the political process.

Petitioners attempt to somehow buttress their argument by quoting a passage criticizing patronage practices from *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). *Lewis*, however, involved discharges, demotions, and other adverse actions against employees. Its comment, moreover, must be viewed in the context of the early 1970's, a situation which after this Court's subsequent decisions in *Elrod* and *Branti*, *supra*, no longer exists. *Lewis* anticipated those decisions.

Petitioners also erroneously assert that the decision in the instant case would "preclude judicial review of the effect of any system of patronage hiring on the rights of candidates and voters." (Pet. at 18) The Court of Appeals, however, expressly noted that it did not address the question of the standing of candidates and voters to challenge political coercion of employees. (23a, n. 14) Furthermore, Petitioners' speculation as to whether any unidentified candidates and voters can successfully challenge some unspecified hiring practices by asserting some fairly traceable injury must remain unresolved at this time.

Likewise, Petitioners' conjecture that the instant decision "would expand the standing requirement to establish a significant barrier to consideration of" some again unidentified "wide range of state practices concerning the electoral process" (Pet. at 19) is unwarranted. This case

involves not the electoral process but the political process. Petitioners' claim of standing must be based on more than speculation or their vague hypotheses as to the guessed effect on some unidentified practices. The Court of Appeals decision would no more block judicial consideration of appropriate cases and controversies than this Court's earlier decisions blocked consideration of *Tashjian v. Republican Party, supra,* that is, not at all.

Finally, Petitioners lift out of context the Court of Appeals statement that the challenged hiring practices do not "completely restrict" political support. (Pet. at 19) No intimation is even hinted, as Petitioners would have this Court believe, that any restriction short of a complete one is insufficient to confer standing. In fact, the Court of Appeals only referred in passing to the lack of any complete restriction, on its way to a description of the nature of the claim that the hiring practices conferred an advantage. (18a)

This Court has aptly stated:

> Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing "focuses on the party seeking to get his complaint before the federal court and not on the issue which he wishes to have adjudicated." [citation omitted] *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 37-38.

Petitioners have utterly failed to demonstrate either that as candidates and voters they can assert any injury fairly traceable to the challenged hiring practices, or that the Court of Appeals decision is in any way inconsistent with the decisions of this Court.

II.

THE COURT OF APPEALS DID NOT REACH THE QUESTION OF THE CONSTITUTIONALITY OF THE HIRING PRACTICES, AND PETITIONERS HAVE NOT ASSERTED ANY BASIS FOR THIS COURT TO REVIEW THE MERITS OF THEIR CLAIM.

The Petition, which dwells on the alleged importance of the question, scarcely suggests that the Court of Appeals did not reach the issue of the constitutionality of the challenged hiring practices. Respondents not only disagree with Petitioners' evaluation, but maintain that neither the merits nor importance of an issue confers standing or warrants granting a writ of certiorari when Petitioners lack standing.

As demonstrated, *supra*, these Petitioners, who are a class of candidates and voters, cannot bootstrap a claim of standing by simply asserting the importance of an issue, or arguing their opinion of the alleged merits of their claim. The Court of Appeals correctly held that standing does not depend upon the merits of the contention of illegality. (15a) *See, Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Furthermore, Petitioners' argument that their rights are infringed depends not only upon their erroneous insistence that the 1969 world is unchanged, but also upon their characterization of their claims, and the challenged hiring practices, as part of the "electoral system." In fact, their claim relates to the political process. As the Court of Appeals aptly emphasized:

> Indeed, this case is not really a challenge to the mechanics of an electoral system at all. We are not asked to evaluate any aspect of the electoral process—the procedure to get on the ballot or to obtain a place on the ballot. (17a-18a)

Petitioners as candidates do not assert deprivation of the opportunity to run for office, or appear on the ballot, or be placed on the ballot in a particular manner. Petitioners as voters do not claim deprivation of an opportunity to vote for a particular candidate. They do not suggest complete restriction of speech and associational rights, but claim that they are disadvantaged. (18a) Indeed, any claim at all is of an indirect (18a) and "particularly attenuated" nature (20a). Petitioners attempt to avoid nearly two decades of progress and current political reality in Cook County by focusing on the allegations of the 1969 complaint (Petition, generally), allegedly supported by some academic research published in 1972 and 1974.[6] (Pet. at 16) As addressed in the Statement of the Case, *supra*, however, the "extensive" practices alleged by the 1969 Complaint are no longer at issue. Their elimination by the 1972 consent decree (5a, 11a-12a), has been reinforced and assured by this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976),[7] and *Branti v. Finkel*, 445 U.S. 507 (1980).

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[6] Several more recent studies have reached the opposite conclusion. J. Moeller, "The Supreme Court's Quest for Fair Politics, 1 Const. Commentary 203 (1984), states that "incumbents may have an unfair advantage and politics may be unfair, but it does not follow that therefore patronage is unconstitutional", and furthermore, "[t]o suggest that all influence can be removed—or should be removed—is to propose a dream world devoid of politics." *Id.* at 216; *See Also*, Johnson, *Political Corruption and Public Policy in America*, 61 (1982), cited in *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983).

[7] Of course, at the time *Elrod v. Burns* was before this Court, the then Sheriff of Cook County was one of the two non-consenting defendants regarding politically based actions affecting incumbent employees. They too, however, subsequently entered into a consent judgment.

Moreover, Petitioners, who lack standing as candidates and voters to assert the alleged rights of job applicants or employees, apparently would ask this Court to now hold that the rights of those groups are similar. This Court has never so held, and in fact its opinions distinguish between the interests involved in discharge or layoff cases, and those relating to hiring, even where affirmative action is involved. *Wygant v. Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842, 1851 (1986) (Powell, J., plurality opinion.).

The only Court of Appeals case considering a challenge to hiring practices by voters and candidates held that the plaintiffs had no standing. *Winpisinger v. Watson, supra*, 628 F.2d 133 (D.C. Cir. 1980). Each Court of Appeals to reach the question of the rights of applicants for either government jobs or contracts, where political factors are a basis for consideration, has refused to hold that such practices are unconstitutional.[8] *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), *cert. denied*, 106 S. Ct. 3276 (1986); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982); *Fox v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982).

Several district courts which have considered the question have, like the Courts of Appeals, refused to extend this Court's analysis in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to hir-

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[8] *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), *cert. denied*, 494 U.S. 892 (1977), cited by Petitioners (Pet. at 12-13, n. 5) was a discharge case, and consequently its statement as to hiring was *dictum*. The Court in *Mazus v. Department of Transportation*, 629 F.2d 870 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), did not need to reach the constitutional question in the case before it, but noted that the *Rosenthal* Court's statement was not binding.

ing cases. *See, Messer v. Curci*, 610 F. Supp. 179 (E.D. Ky. 1985) (appeal pending); *Rutan v. Republican Party*, 641 F. Supp. 249 (C.D. Ill. 1986) (appeal pending). In *Rutan*, the court dismissed not only the claims of job applicants and employees, but also those of voters.

The two district courts to suggest that politically based hiring practices are unconstitutional rely, incorrectly, on the application of *Elrod v. Burns* and *Branti v. Finkel* to hiring practices. *See, Torres v. Grunkmeyer*, 601 F. Supp. 1043 (D. Wyo. 1984), and *Indiana State Employees Association v. Indiana Republican State Central Committee*, 630 F. Supp. 1194 (S.D. Ind. 1986).[9] Even Petitioners in the instant case concede that the holdings of *Elrod* and *Branti* "were limited to the legality of political discharges." (Pet. at 11-12)

If claims of politically based hiring practices cannot support a job applicant's cause of action, they manifestly do not support the eminently more remote and attenuated claims of candidates and voters. Contrary to Petitioners' contentions, neither this case nor this issue is of serious consequence to millions of voters across the nation. Judicial intervention is manifestly not warranted in such purely political matters.

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[9] In two other cases, the issue was not reached. In *Gomez v. South Bend*, 605 F. Supp. 1173 (N.D. Ind. 1985), cited by Petitioners (Pet. at 13, n. 5) the Court assumed for the sake of argument that a claim of a hiring decision based on political neutrality could support a cause of action, and then found that the plaintiff had not even shown any such motivating factor. In *Cullen v. New York Civil Service Commission*, 435 F. Supp. 546 (E.D. N.Y.) appeal dismissed, 566 F.2d 846 (2nd Cir. 1977), also cited by Petitioners in footnote 5, the Court merely held that civil service jobs could not be conditioned upon political contributions.

Petitioners' argument begs the question of the impact upon them of the challenged hiring practices, and erroneously presumes not only coercion, but the alleged "extensive" nature of the hiring practices. All three of these bases for Petitioners' argument are utterly negated by the consent decree regarding, *inter alia*, politically motivated discharges. As a result of that decree, the combined impact of political hiring and firing practices, which comprised a substantial portion of the original case, and upon which Petitioners now depend, is simply no longer at issue.

CONCLUSION

For the foregoing reasons, Respondents pray that the Writ be denied.

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No. 87-1075

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, *et al.*,
Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

The Brief in Opposition seeks to characterize this case as one concerning patronage practices whose electoral sting has been long removed by a consent decree forbidding political *firings*. This wholly misstates the case.

The case before the Court for review arises from a 1985 district court judgment with respect to respondents' politically conditioned *hiring* practices. That judgment was based on respondents' own admissions that their patronage hiring practices give candidates of the Cook County regular

Democratic organization a substantial electoral advantage over disfavored candidates and voters.[1] Significantly, those admissions were made years after entry of the 1972 consent decree forbidding political firings. Thus, respondents themselves admit that the injury to the rights of independent candidates and voters caused by the patronage hiring system was not eliminated by the earlier consent decree as to political discharges.

Respondents' admissions concerning the scope and effect of their patronage hiring system have, moreover, not been withdrawn or modified. The record in the case thus remains particularly straightforward. Respondents do not dispute that they continue to base hiring on active political support of the regular Democratic organization. Nor do they deny that their purpose in doing so is to provide an electioneering advantage for their officially favored candidates.[2]

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[1] The district court found, based on admissions and stipulations made *after* the 1972 *firing* consent decree, that the patronage *hiring* practices in issue produced a "substantial, perhaps massive, political effort" for regular Democratic organization candidates and against independent candidates and voters. [Appendix, 78a, n.18]. It also found that:

> [t]he patronage employment system described above helps regular Democrats win elections. It provides a significant advantage in Chicago and in Cook County, Illinois, to candidates supported by the regular Democratic organization and a corresponding disadvantage to opposing candidates, including independent candidates.... [Appendix, 149a-150a].

Respondents admit that this is one of the purposes of their patronage hiring system. [Appendix, 98a].

[2] The only significant change which has occurred in defendants' hiring practices has been as a result of consent decrees entered in this case barring political hiring by certain other defendants, including the City of Chicago. Significantly, however, the City (which has 40,000 employees) now has moved to vacate

(Footnote continued on the following page)

In any event, for standing purposes the allegations of the complaint as to injury must be taken as true. Here the allegations in the complaint set forth in detail the injury to independent voters and candidates from defendants' patronage employment system. Those allegations of injury were repeated in petitioners' motion for summary judgment and thus plainly apply to the hiring claims.

The Brief in Opposition argues that disfavored candidates and voters do not have standing to challenge politically conditioned hiring, no matter how extensive it may be or how much of an impact it may have on political competition, because any such effect is said to be "speculative". This is, respondents argue, because no one is "required" to give political support to favored candidates, or to refrain from giving support to disfavored candidates.

This argument also is contrary to the record. Respondents specifically admit that active political support for favored candidates is required to get jobs. [Appendix, 136a, 148a] And persons who do get the jobs must continue to give political support if they want job advancement. Moreover, as is specifically admitted:

> Usually no person is recommended by a member of the regular Democratic organization for a public employment position if he or she has in any open way been a worker or partisan of any political group opposed to or by the Cook County Democratic Organization. . . . [Appendix, 93a]

The unconstitutional burden which this pervasive system of political hiring imposes upon independent candidates and voters is neither "attenuated" nor "speculative." The State directly and substantially burdens the ability of

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2 *(Continued)*

that decree on the basis of the court of appeals' opinion as to which review is sought. This development further emphasizes the importance of the matter before the Court.

disfavored candidates to attract support by excluding their supporters from an opportunity for employment.

The electioneering support which the system produces for the State's officially favored candidates does not depend on "independent" decisions of other persons. Political support is *required* in order to get a job or, having one, to get a better one.

The effects of respondents' patronage hiring system are thus clear and direct. It produces a substantial disadvantage to disfavored candidates and voters, directly traceable to the practices in issue. That is the whole point of respondents' politically conditioned hiring system–to use the State's resources to give the incumbent faction an electioneering advantage, and correspondingly to disadvantage disfavored candidates and voters. This is precisely the kind of direct injury that article III courts must be permitted to scrutinize if they are to serve their historic function of protecting the democratic process from unconstitutional abuses by those in control of the State.

The Brief in Opposition submits that the decision of the court of appeals is not appropriate for review because, having been decided on standing, the decision does not present issues of importance. This is by no means the case. The decision would bar disfavored candidates and voters, as a matter of law, from pleading and proving injury to their constitutional rights caused by politically conditioned hiring practices. This would be the case no matter how extensive such practices are, or the extent to which they impair political competition. The decision of the court of appeals is in essence a ruling that disfavored candidates and voters have no constitutional rights which can be abridged by such a system. The ruling on standing *is* the ruling on the substantive constitutional claims of candidates and voters. It is thus a decision of substantial importance to the free functioning of the political process.

A writ of certiorari should issue for the decision to be reviewed by this Court.

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